89-1391

NOS. 89-_____, _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

DR. IRVING RUST, on behalf of himself, his patients, and all others similarly situated, DR. MELVIN PADAWER, on behalf of himself, his patients, and all others similarly situated, MEDICAL AND HEALTH RESEARCH ASSOCIATION OF NEW YORK CITY, INC., PLANNED PARENTHOOD OF NEW YORK CITY, INC., PLANNED PARENTHOOD OF WESTCHESTER/ROCKLAND, and HEALTH SERVICES OF HUDSON COUNTY, NEW JERSEY,

Petitioners,

—v.—

DR. LOUIS SULLIVAN, or his successor, Secretary of the United States Department of Health and Human Services,

Respondent.

THE STATE OF NEW YORK, THE CITY OF NEW YORK, THE NEW YORK CITY HEALTH & HOSPITALS CORP.,

Petitioners,

—v.—

DR. LOUIS SULLIVAN, or his successor, Secretary of the United States Department of Health and Human Services,

Respondent.

APPENDIX TO PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Amendments of Regulations Governing Grants for Family Planning Services

53 Fed. Reg. 2944-46 (1988)

(codified at 42 C.F.R. §§ 59.2, 59.5, 59.7, 59.8, 59.9, 59.10)

For the reasons set out in the preamble, Subpart A of Part 59, 42 Code of Federal Regulations, is hereby amended as set forth below.

PART 59—[AMENDED]

1. The authority citation for Subpart A of 42 CFR Part 59 is revised to read as follows:

Authority: 42 U.S.C. 300a—4

2. In 42 CFR 59.2, the following definitions are added:

§ 59.2 [Amended]

* * * * *

"Family planning" means the process of establishing objectives for the number and spacing of one's children and selecting the means by which those objectives may be achieved. These means include a broad range of acceptable and effective methods and services to limit or enhance fertility, including contraceptive methods (including natural family planning and abstinence) and the management of infertility (including adoption). Family planning services includes preconceptional counseling, education, and general reproductive health care (including diagnosis and treatment of infections which threaten reproductive capability). Family planning does not include pregnancy care (including obstetric or prenatal care). As required by section 1008 of the Act, abortion may not be included as a method of family planning in the Title X project. Family planning, as supported under this subpart, should reduce the incidence of abortion.

"Grantee" means the organization to which a grant is awarded under section 1001 of the Act.

* * * * *

"Prenatal care" means medical services provided to a pregnant woman to promote maternal and fetal health.

"Program" and "project" are used interchangeably and mean a coherent assembly of plans, activities and supporting resources contained within an administrative framework.

* * * * *

"Title X" means Title X of the Act, 42 U.S.C. 300, *et seq.*

"Title X program" and "Title X project" are used interchangeably and mean the identified program which is approved by the Secretary for support under section 1001 of the Act, as the context may require. Title X project funds include all funds allocated to the Title X program, including but not limited to grant funds, grant-related income or matching funds.

§ 59.5 [Amended]

3. In 42 CFR 59.5(a), paragraph (a)(5) is removed and paragraphs (a)(6) through (a)(11) are redesignated as paragraphs (a)(5) through (a)(10) respectively.

4. 42 CFR 59.5(b)(3)(i) is revised to read as follows:

§ 59.5 [Amended]

* * * * *

(b) * * *

(3) * * *

(i) achieve community understanding of the objectives of the Title X program.

* * * * *

5. In 42 CFR Part 59, § 59.7 through § 59.13 are redesignated as § 59.11 through § 59.17 respectively, and new § 59.7 through § 59.10 are added to read as follows:

§ 59.7 Standards of compliance with prohibition on abortion.

A project may not receive funds under this subpart unless it provides assurance satisfactory to the Secretary that it does not include abortion as a method of family planning. Such assurance must include, as a minimum, representations (supported by such documentation as the Secretary may request) as to compliance with each of the requirements in § 59.8 through § 59.10. A project must comply with such requirements at all times during the period for which support under Title X is provided.

§ 59.8 Prohibition on counseling and referral for abortion services; limitation of program services to family planning.

(a)(1) A Title X project may not provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning.

(2) Because Title X funds are intended only for family planning, once a client served by a Title X project is diagnosed as pregnant, she must be referred for appropriate prenatal and/or social services by furnishing a list of available providers that promote the welfare of mother and unborn child. She must also be provided with information necessary to protect the health of mother and unborn child until such time as the referral appointment is kept. In cases in which emergency care is required, however, the Title X project shall be required only to refer the client immediately to an appropriate provider of emergency medical services.

(3) A Title X project may not use prenatal, social service or emergency medical or other referrals as an indirect means of encouraging or promoting abortion as a method of family planning, such as by weighing the list of referrals in favor of health care providers which perform abortions, by including on the list of referral providers health care providers whose principal business is the provision of abortions, by excluding available providers who do not provide abortions, or by "steering" clients to providers who offer abortion as a method of family planning.

(4) Nothing in this subpart shall be construed as prohibiting the provision of information to a project client which is medically necessary to assess the risks and benefits of different methods of contraception in the course of selecting a method: *provided*, that the provision of this information does not include counseling with respect to or otherwise promote abortion as a method of family planning.

(b) *Examples.* (1) A pregnant client of a Title X project requests prenatal care services, which project personnel are qualified to provide. Because the provision of such services is outside the scope of family planning supported by Title X, the client must be referred to appropriate providers of prenatal care.

(2) A Title X project discovers an ectopic pregnancy in the course of conducting a physical examination of a client. Referral arrangements for emergency medical care are immediately provided. Such action is in compliance with the requirements of paragraph (a)(2) of this section.

(3) A pregnant woman asks the Title X project to provide her with a list of abortion providers in the area. The Title X project tells her that it does not refer for abortion but provides her a list which includes, among other health care providers, a local clinic which principally provides abortions. Inclusion of the clinic on the list is inconsistent with paragraph (a)(3) of this section.

(4) A pregnant woman asks the Title X project to provide her with a list of abortion providers in the area. The project tells her that it does not refer for abortion and provides her a list which consists of hospitals and clinics and other providers which provide prenatal care and also provide abortions. None of the entries on the list are providers that principally provide abortions. Although there are several appropriate providers of prenatal care in the area which do not provide or refer for abortions, none of these providers are included on the list. Provision of the list is inconsistent with paragraph (a)(3) of this section.

(5) A pregnant woman requests information on abortion and asks the Title X project to refer her to an abortion provider. The project counselor tells her that the project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion. The counselor further tells the client that the project can help her to obtain prenatal care and necessary social services, and provides her with a list of such providers from which the client may choose. Such actions are consistent with paragraph (a) of this section.

(6) Title X project staff provide contraceptive counseling to a client in order to assist her in selecting a contraceptive method. In discussing oral contraceptives, the project counselor provides the client with information contained in the patient package insert accompanying a brand of oral contraceptives, referring to abortion only in the context of a discussion of the relative safety of various contraceptive methods and in no way promoting abortion as a method of family planning. The provision of this information does not constitute abortion counseling or referral.

§ 59.9 Maintenance of program integrity.

A Title X project must be organized so that it is physically and financially separate, as determined in accordance with the review established in this section, from activities which are prohibited under section 1008 of the Act, and § 59.8 and § 59.10 of those regulations from inclusion in the Title X program. In order to be physically and financially separate, a Title X project must have an objective integrity and independence from prohibited activities. Mere bookkeeping separation of Title X funds from other monies is not sufficient. The Secretary will determine whether such objective integrity and independence exist based on a review of facts and circumstances. Factors relevant to this determination shall include (but are not limited to):

(a) The existence of separate accounting records;

(b) The degree of separation from facilities (*e.g.*, treatment, consultation, examination, and waiting rooms) in which pro-

hibited activities occur and the extent of such prohibited activities;

(c) The existence of separate personnel;

(d) The extent to which signs and other forms of identification of the Title X project are present and signs and material promoting abortion are absent.

§ 59.10 Prohibition on activities that encourage, promote or advocate abortion.

(a) A Title X project may not encourage, promote or advocate abortion as a method of family planning. This requirement prohibits actions to assist women to obtain abortions or increase the availability or accessibility of abortion for family planning purposes. Prohibited actions include the use of Title X project funds for the following:

(1) Lobbying for the passage of legislation to increase in any way the availability of abortion as a method of family planning;

(2) Providing speakers to promote the use of abortion as a method of family planning;

(3) Paying dues to any group that as a significant part of its activities advocates abortion as a method of family planning;

(4) Using legal action to make abortion available in any way as a method of family planning; and

(5) Developing or disseminating in any way materials (including printed matter and audiovisual materials) advocating abortion as a method of family planning.

(b) *Examples.* (1) Clients at a Title X project are given brochures advertising an abortion clinic. Provision of the brochure violates subparagraph (a) of this section.

(2) A Title X project makes an appointment for a pregnant client with an abortion clinic. The Title X project has violated paragraph (a) of this section.

(3) A Title X project pays dues to a state association which, among other activities, lobbies at state and local levels for the

passage of legislation to protect and expand the legal availability of abortion as a method of family planning. The association spends a significant amount of its annual budget on such activity. Payment of dues to the association violates paragraph (a)(3) of this section.

(4) An organization conducts a number of activities, including operating a Title X project. The organization uses non-project funds to pay dues to an association which, among other activities, engages in lobbying to protect and expand the legal availability of abortion as a method of family planning. The association spends a significant amount of its annual budget on such activity. Payment of dues to the association by the organization does not violate paragraph (a)(3) of this section.

(5) An organization that operates a Title X project engages in lobbying to increase the legal availability of abortion as a method of family planning. The project itself engages in no such activities and the facilities and funds of the project are kept separate from prohibited activities. The project is not in violation of paragraph (a)(1) of this section.

(6) Employees of a Title X project write their legislative representatives in support of legislation seeking to expand the legal availability of abortion, using no project funds to do so. The Title X project has not violated paragraph (a)(1) of this section.

(7) On her own time and at her own expense, a Title X project employee speaks before a legislative body in support of abortion as a method of family planning. The Title X project has not violated paragraph (a) of this section.

6. In addition to the amendments set forth above, in 42 CFR Part 59 remove the words "project" or "projects" or "project's" and add in their place, the words "Title X project" or "Title X projects" or "Title X project's," respectively, in the following places:

(a) Section 59.2 definition of "low income family";

(b) Section 59.5(a)(1);

(c) Section 59.5(b), introductory text;

(d) Section 59.5(b)(3)(iii);

(e) Section 59.5(b)(4);

(f) Section 59.5(b)(7);

(g) Section 59.5(b)(10);

(h) Section 59.6(a);

(i) Newly redesignated § 59.11(a);

(k) Newly redesignated § 59.11(a)(7);

(l) Newly redesignated § 59.11(b);

(m) Newly redesignated § 59.11(c);

(n) Newly redesignated § 59.12(a), the first time it appears;

(o) Newly redesignated § 59.15;

(p) Newly redesignated § 59.16(a).

. . . .

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

88 Civ. 0701, 0702 (LLS)

THE STATE OF NEW YORK, *et al.*,

Plaintiffs,

—against—

OTIS R. BOWEN, Secretary of the United States Department of Health and Human Services,

Defendant.

DR. IRVING RUST, *et al.*,

Plaintiffs,

—against—

OTIS R. BOWEN, Secretary of the United States Department of Health and Human Services,

Defendant.

OPINION AND ORDER

Plaintiffs challenge final regulations promulgated on February 2, 1988 by the Department of Health and Human Services, which prohibit Title X projects[1] from counseling or referring

1 In 1970 Congress enacted the Family Planning Services and Population Research Act of 1970, Pub. L. No. 91-572, 84 Stat. 1506 (codified at 42 U.S.C. §§ 300-300a-8 (1982)). The Family Planning Services and Population Research Act is the popular name for Subchapter VIII of the Public Health and Welfare laws (which appear at Title 42 of the United States Code), and is commonly called Title X (referring to its designation as Title X of Chapter 373 of Public Law No. 91-572).

(*Footnote continues on following page*)

clients for abortion as a method of family planning, require Title X grantees to separate their projects, physically and financially, from any abortion activities, and prohibit Title X projects from encouraging, promoting or advocating abortion as a method of family planning. At a hearing on February 19, 1988 defendant was enjoined from enforcing the regulations with respect to these plaintiffs until further order. Both sides[2] have moved for summary judgment pursuant to Fed. R. Civ. P. 56.

There is no dispute about any of the facts material to the disposition of these motions.

BACKGROUND

1. The Parties

Plaintiff State of New York ("State") is a grantee of Title X funds through the New York State Department of Health ("NYSDOH"). In 1987-88, NYSDOH distributed nearly $6 million in Title X grants to 37 agencies. Plaintiff City of New York ("City"), through its Department of Health, provides technical and consultative services to Title X grantees in New York City. It brings suit on behalf of itself and the people of the City. Plaintiff New York City Health and Hospitals Corporation ("NYCHHC"), a public benefit corporation, is a principal provider of hospital services to the low income population of the City.

Plaintiff Dr. Irving Rust, an obstetrician and gynecologist, is the Medical Director of the Bronx Center, a facility of plaintiff Planned Parenthood of New York City, Inc. ("PPNYC"), and

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The new regulations provide that " 'Title X program' and 'Title X project' are used interchangeably and mean the identified program which is approved by the Secretary for support under section 1001 of the Act . . ." 53 Fed. Reg. 2922, 2944 (Feb. 2, 1988) (to be codified at 42 C.F.R. § 59.2). In this opinion the term "Title X grantee" is also used for the same purpose.

2 Motions to submit *amicus curiae* briefs on the Secretary's behalf by Senator Gordon J. Humphrey and Congressman Thomas J. Tauke, et al. and the American Academy of Medical Ethics, et al., and on plaintiffs' behalf by the American Medical Association, are granted.

plaintiff Dr. Melvin Padawer is the Medical Director of plaintiff Planned Parenthood of Westchester/Rockland ("PPWR"). As such, each supervises a Title X funded health care program.

PPNYC, a not-for-profit corporation, is the single largest provider of family planning services in the City, serving over 31,000 persons per year. PPNYC's Bronx Center, its only Title X-funded facility, receives a $439,391 Title X grant, amounting to 50% of its family planning budget. PPWR, composed of two not-for-profit corporations, operates seven clinics which provide a broad array of reproductive health care services throughout Westchester and Rockland counties. PPWR receives $325,000 from NYSDOH under Title X, which is 23% of its family planning budget. Plaintiff Health Services of Hudson County, New Jersey ("Hudson Health"), a provider of family planning, maternal and infant care, pregnancy testing, options counseling, and abortion services, receives a Title X grant of $148,674, which is 33% of its family planning budget. PPNYC, PPWR, and Hudson Health all sue on their own behalf, as well as for their staffs and patients. Although all three perform abortions at one or more of their locations, none uses Title X funds for that purpose.

Plaintiff Medical Health and Research Association of New York ("MHRA"), a not-for-profit organization, has received Title X grants since 1982. Its 1987 grant amounted to $2,104,950. MHRA, in turn, subgrants Title X funds to other organizations, including PPNYC. It also retains some Title X funds for its own service division, the Maternity, Infant Care—Family Planning Projects ("MIC-FPP"). MHRA sues on behalf of itself, MIC-FPP, and its patients.

Defendant Otis R. Bowen is the Secretary of the United States Department of Health and Human Services ("HHS") ("the Secretary"), and is authorized to make Title X grants "in accordance with such regulations as the Secretary may promulgate." 42 U.S.C. § 300a-4(a) (1982).

II. The Statute and Regulations

In enacting Title X, Congress sought "to make comprehensive, voluntary family planning services, and information relating thereto, readily available to all persons . . ." 116 Cong. Rec. 24094 (1970). Section 1008 of Title X provides:

> None of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning. 42 U.S.C. § 300a-6 (1982).

The challenged regulations, appearing at 53 Fed. Reg. 2922 *et seq.* (Feb. 2, 1988) (to be codified at 42 C.F.R. §§ 59.2, 59.8, 59.9, 59.10) control the use of funds for family planning services and set specific standards for compliance with Title X.

In plaintiffs' view sections 59.2, 59.8, 59.9, and 59.10 frustrate Congressional intent, and violate Title X clients' First and Fifth Amendment rights and Title X health providers' First Amendment rights.

Section 59.2 adds new definitions. It defines "family planning" as

> the process of establishing objectives for the number and spacing of one's children and selecting the means by which those objectives may be achieved . . . including contraceptive methods . . . and the management of infertility . . . , preconceptional counseling, education, and general reproductive health care. . . . Family planning does not include pregnancy care (including obstetric or prenatal care).[3] As required by section 1008 of the Act, abortion may not be included as a method of family planning in the Title X project.

3 The separation between family planning (which occurs exclusively before pregnancy) on the one hand, and pregnancy, pre-natal and obstetric care (which naturally occur after conception) on the other, is a significant concept in the new regulations. It underlies the Secretary's views that abortion counseling has no function in family planning (abortion is irrelevant until after "planning" has failed), and that Title X programs deal with family planning, not pregnancy services or counseling for which they merely supply a list of references.

Section 59.2 also defines "project funds" to include "all funds allocated to the Title X program, including but not limited to grant funds, grant-related income or matching funds."

Section 59.8 ("the counseling and referral prohibition") sets forth the role of the Title X program after a woman is diagnosed as pregnant. To remain eligible for Title X grants, a project may not provide counseling or referral for abortion as a method of family planning. § 59.8(a)(1) Title X projects must refer every pregnant client for "appropriate prenatal and/or social services", furnish her with a "list of available providers that promote the welfare of mother and unborn child", and provide her "with information necessary to protect the health of the mother and unborn child until such time as the referral appointment is kept." § 59.8(a)(2). The list may not be used indirectly to encourage or promote abortion, such as by weighing the list in favor of health care providers who provide abortions: it may not include providers whose "principal business is the provision of abortions," exclude providers who do not provide abortions, or "steer" clients to providers who offer abortion as a method of family planning. § 59.8(a)(3) Information "medically necessary to assess the risks and benefits of different methods of contraception" may be provided, but again counseling about or promoting abortion as a method of family planning is prohibited. § 59.8(a)(4). Example 6 under section 59.8(b)(4), however, does allow a client to be provided with "information contained in the [oral contraceptive] package insert . . . , referring to abortion only in the context of a discussion of the relative safety of various contraceptive methods and in no way promoting abortion as a method of family planning."

Section 59.9 (the "separation requirement") requires the physical and financial separation of Title X projects from activities proscribed by section 1008 of Title X and sections 59.8 and 59.10. Satisfaction of the criterion, "objective integrity and independence from prohibited activity," will be determined by the Secretary on a case-by-case basis. Relevant factors include separate accounting records, facilities, personnel, signs, and other forms of identification. § 59.9(a)-(d)

Under section 59.10 a Title X project may not "encourage, promote, or advocate abortion as a method of family planning." § 59.10(a) Specifically prohibited activities include lobbying in support of pro-abortion legislation, providing pro-abortion speakers, paying dues to any group which advocates abortion, "using legal action" to make abortion available, and developing and disseminating materials advocating abortion. § 59.10(a)(1)-(5)

III. Questions Presented

Plaintiffs contend that these regulations violate the intent and letter of Title X. Further, they argue that sections 59.8 and 59.10 are viewpoint discriminatory, censor speech and impair a woman's fundamental right to informed reproductive choice, in violation of the First and Fifth Amendments.

The Secretary contends that these regulations implement "the Congressional command that no federal funds supporting Title X family planning projects be used to advance abortion as a method of family planning," (Defendant's Memorandum in Support of Summary Judgment, p.3) ("Defendant's Memorandum") and do not place unduly burdensome restrictions on protected rights. (*Id.* at 49)

In resolving these legal contentions, the court is not to consider the morality or wisdom of the regulations, nor to substitute its views for either the enactments of the legislature or the regulations of the Secretary. Those issues are grave and fervently debated, and convictions regarding them are conflicting and deeply held, and they should be settled at the polls where each voice can count. The court's duty in this case is narrow: to determine whether the regulations exceed or contravene the Secretary's authority under Title X and, if not, whether they infringe rights protected by the Constitution. Unlike the other two district courts which have reviewed the regulations[4], I conclude that they do not.

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4 The United States District Court for the District of Colorado preliminarily enjoined the Secretary from enforcing the regulations on February 18, 1988, *see Planned Parenthood Federation of America, et al. v. Bowen*, 680 F. Supp. 1465 (D. Colo. 1988), and entered a permanent injunction on June 15, 1988. The United States District Court for the District of Massachusetts entered a permanent injunction against enforcement of the regulations in *Commonwealth of Massachusetts, et al. v. Bowen*, 679 F. Supp. 137 (D. Mass. 1988), *appeal pending*, 1st Cir. No. 88-1279. Both courts issued thoughtful opinions on questions presented by these cases.

DISCUSSION

I. Congressional Intent

The court's first inquiry is whether the regulations sufficiently accord with the intent of Congress.

A. Statutory Language

"The starting point for reviewing an agency's construction of a statute is the language of the statute." *Securities Industry Association v. Board of Governors of the Federal Reserve System*, 839 F.2d 47, 52 (2d. Cir. 1988). As the Court stated in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43, 843 n.11 (1984):

> If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, . . . the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding."

At issue here is section 1008 of Title X which provides:

> None of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning.

Standing alone, that statutory language does not specifically control the questions addressed by the regulations: Can clients

be referred to or counseled about abortion services? To what degree must facilities which perform abortions or abortion-related services be separated from those eligible to receive Title X grants? May grantees of Title X funds use funds from other sources to engage in activities restricted by the regulations? Therefore the appropriate query is whether the new regulations are "based on a permissible construction" of Title X.

In making such a determination, the court looks to section 1008's legislative history, as well as Congress's and HHS's interpretations of section 1008 since its enactment. *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 110-20 (1980).

B. Legislative History

Congress's enactment of Title X was not without lengthy testimony, detailed reports, and significant floor debate. The provisions of Title X which generated such discussion, however, almost exclusively concerned Congress's twin goals of making family planning services affordable and not coercing anyone to restrict the size of her family. Few comments addressed the matters now before the court, and those do not elaborate on Congress's intent regarding counseling and referral, or encouraging, promoting, and advocating abortion.

Plaintiffs argue that the Secretary's limitation on family planning services (i.e., that Title X's provision of services terminates upon pregnancy) contravenes congressional contemplation that "comprehensive" and "continuing" family planning services would be available for women of lower incomes, pointing to the Senate Report:

> The committee does not view family planning as merely a euphemism for birth control. It is properly a part of comprehensive health care and should consist of much more than the dispensation of contraceptive devices. . . . [A] successful family planning program must contain . . . medical services, including consultative examination, prescription, and continuing supervision, supplies, instruction, and referral to other medical services as needed. S. Rep. No. 1004, 91st Cong., 2d Sess., *reprinted in* 116 Cong. Rec. 24,094 (1970).

Although members of Congress vehemently declared that Title X funds would not support abortions[5], apparently none stated that Title X services would be limited to women who were not pregnant.

Plaintiffs also argue that HHS's separation requirement and definition of "project funds" diverge from Congress's vision that Title X programs would work hand-in-hand with state and local family planning services:

> It is, and has been, the intent of both Houses that the funds authorized under this legislation be used only to support preventive family planning services, population research, infertility services, and other related medical, informational, and educational activities. The conferees have adopted the language contained in section 1008, which prohibits the use of such funds for abortion, in order to make clear this intent. The legislation does not and is not intended to interfere with or limit programs conducted in accordance with State or local laws and regulations which are supported by funds other than those authorized under this legislation. Conf. Rep. No. 91-1667, 91st Cong., 2d Sess. 8-9 (1970).

They argue that the final sentence quoted above would allow grantees who receive support in addition to Title X funds (as all grantees must) to provide abortion-related services approved under local laws. That appears a permissible, although not a necessary, interpretation.

On balance, if these are discrepancies they do not appear of sufficient weight (when contrasted with the direct statutory lan-

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5 "[T]his legislation does not provide for abortions, contrary to some of the rumors apparently circulating concerning it" (116 Cong. Rec. 37367, remarks of Rep. Nelson); "I strongly support . . . the provision in the House version of this legislation that prevents this bill from being construed as support for abortion." (116 Cong. Rec. 37371, remarks of Rep. Pickle); Congress "wisely prohibited the use of any Federal funds in the bill from being used for abortion." (116 Cong. Rec. 37375, remarks of Rep. Broyhill); "With the 'prohibition of abortion' amendment—title X, section 1008—the committee members clearly intend that abortion is not to be encouraged or promoted in any way through this legislation." (116 Cong. Rec. 37375, remarks of Rep. Dingell).

guage) to compel the conclusion that the regulations are beyond the Secretary's broad authority. Only when Congress's intent is clear and certain can the regulations be enjoined on the basis of legislative history alone:

> "The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Morton v. Ruiz*, 415 U.S. 199, 231 (1974). If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency. (footnotes omitted)

Chevron, 467 U.S. at 843-44.

C. Subsequent Legislation and Legislative Interpretations

Plaintiffs assert that since 1970 "Congress has retained the original language of section 1008" (Plaintiff Rust's Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction, p. 19) ("Rust Memorandum") and "consistently defeated amendments meant to accomplish what the new regulations impose." (Plaintiff State's Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction, p. 35) They say "amendments to Title X seeking to prohibit counseling, referral, or what has been called promotion or encouragement of abortion, have been introduced and rejected *seven* times." (Plaintiff Rust's Reply to Defendant's Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction, p. 6) (emphasis in original).

Whereas "subsequent legislation declaring the intent of an earlier statute is entitled to significant weight," *National Labor Relations Board v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 275 (1974), this court is also mindful that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one," *Consumer Product Safety Commission*, 447 U.S. at 117 (quoting *United States v. Price*, 361 U.S. 304, 313 (1960)).

A thorough review of Congress's statements regarding Title X, and its treatment of proposed amendments over the past eighteen years, fails to sustain plaintiffs' assertions.

Title X's initial authorization for appropriations ran through fiscal year 1973. In that year, Congress passed the Health Programs Extension Act of 1973, Pub. L. No. 93-45, 87 Stat. 93, which extended Title X's funding for another fiscal year. Discussion of Title X was limited to one paragraph, concerning only the levels of current and proposed funding. *See* H. Rep. No. 93-227, 1973 Code Cong. & Admin. News 1464, 1472 (1973).

By a vote of 247 to 123, the House defeated the following proposed amendment to Title X's appropriation for fiscal year 1974:

> No part of the funds appropriated under this Act shall be used in any manner directly or indirectly to pay for abortions or abortion referral services, abortifacient drugs or devices, the promotion or encouraging of abortion, or the support of research designed to develop methods of abortion, or to force any State, school or school district or any other recipient of Federal funds to provide abortions or health or disability insurance abortion benefits. 120 Cong. Rec. 21,687-95 (1974)

The debate on this amendment sheds no light on the issues presented by the new regulations.

The Family Planning Services and Population Research Act of 1975, Pub. L. No. 94-63, 89 Stat. 304 authorized appropriations for Title X through fiscal year 1977. The House, with virtually no debate and no recorded vote, rejected an amendment to the appropriations bill forbidding Title X grantees to "pay

for abortions, or to promote or encourage abortions." 121 Cong. Rec. 20,863-64 (1975) The Senate Report stated that Title X's intent "was to greatly expand the availability of voluntary planning services with priority on low-income individuals." 1975 Code Cong. & Admin. News 469, 515. It explained that Title X programs offer both medical and social services including counseling, and stated the Committee on Labor and Public Welfare's belief "that provision of contraceptive services should be preceded by counseling about the consequences and significance of a decision to use contraceptives." *Id.* at 517. The Report also defined the requirement of informed consent to include:

> (1) a fair explanation of the procedures to be followed, including an identification of any which are experimental; (2) a description of any attendant discomforts and risks reasonably to be expected; (3) a fair explanation of the likely results should the procedure fail; (4) a description of any benefits reasonably to be expected; (5) a disclosure of any appropriate alternative methods or procedures that might be advantageous; (6) an offer to answer any inquiries concerning the procedures; and (7) an instruction that the subject is free either to decline entrance into a project or to withdraw his or her consent and to discontinue participation in the project or activity at any time without prejudicing future care. *Id.* at 524-25.

The Committee, although "generally impressed that [Title X] has worked very well," believed several sections "need[ed] strengthening and clarification." *Id.* at 521. Section 1008 was not among them.

In 1977, the Health Services Extension Act of 1977, Pub. L. No. 95-83, 91 Stat. 389, extended Title X's funding through fiscal year 1978.

When debate was held on Title X's reauthorization in 1978, Representative Dornan proposed the following amendment:

> No grant or contract authorized by this Title may be made or entered into with an entity which directly or indirectly

> provides abortion, abortion counseling, or abortion referral services. 124 Cong. Rec. 37045 (1978)

The sponsor of the reauthorization, Representative Rogers, argued that it was not necessary in light of section 1008's prohibition. The amendment was defeated.

The Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357, *reprinted in* 1981 Code Cong. & Admin. News 396, 888, extended Title X's funding through 1984, and stated that Title X's services "include medical examinations, counseling, pregnancy tests, information and education activities, and birth control and infertility services."

The House Energy and Commerce Committee Report on the Extension of Title X in 1985 contained the following:

> Title X has included a prohibition on the use of family planning funds for abortion since its enactment in 1970. The Committee . . . is satisfied that Title X grantees are complying with this prohibition. Indeed, in 1984, Secretary Heckler testified before the Subcommittee on Health and the Environment that Title X's grantees 'have been very aware and have honored the law in terms of the abortion prohibition. . . .' The Committee, therefore, has overwhelmingly rejected proposed amendments that would affect the interpretation and implementation of this section and has chosen instead to re-affirm the language of the 1970 Conference Report, H. Rept. No. 91-1667 accompanying the original Title X legislation:
>
> > The Conferees have adopted the language in Section 1008, which prohibits the use of [Title X] funds for abortion, in order to make clear this intent. The legislation does not and is not intended to interfere with or limit programs conducted in accordance with State or local laws and regulations which are supported by funds other than those under this legislation.
>
> The Committee has renewed this prohibition in the belief that it is adequate. The Committee does not intend—and would discourage—regulatory efforts to modify restrictions that the Committee has chosen to retain. Previous

efforts to create restrictions beyond the original intent of the law have been unnecessary and without statutory foundation. H. R. Rep. No. 99-159, June 4, 1985, 6-7.

In 1985, Congress extended Title X's funding by continuing resolution. The House Report approved HHS's 1981 guidelines which provide for "non-directive" counseling. (see below) H.R. Rep. No. 403, 99th Cong., 1st Sess. 6 (1985). Since 1985 funding for Title X has been provided for by continuing resolution.

Thus, despite the interpretation of specific statements urged by the parties to support their views, it appears that no explicit guidance, or even illumination, is supplied by the legislature's subsequent treatment of Title X, at least as far as the issues in this case are concerned.

D. HHS Interpretations since 1970

"In addition to the importance of legislative history, a court may accord great weight to the longstanding interpretation placed on a statute by an agency charged with its administration. This is especially so where Congress has re-enacted the statute without pertinent change." *National Labor Relations Board*, 416 U.S. at 275. *Accord Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company*, 462 U.S. 27, 42 (1983) ("agency's interpretation of a statute may be confirmed or ratified by subsequent congressional failure to change that interpretation") An agency, however, is not required "to establish rules of conduct to last forever." *Motor Vehicle*, 463 U.S. at 45.

Counseling and Referral Prohibition

Plaintiffs assert that HHS has "long interpreted the statute to allow Title X clinics to provide non-directive, unbiased counseling regarding the options available to pregnant women, including abortion, and when appropriate, to refer clients to abortion providers." (Rust Memorandum, p. 4)

A series of memoranda and letters[6] written by HHS[7] staff counsel during the 1970's discuss, and approve, non-directive counseling. See, *e.g.*, November 19, 1976 letter from Louise Hellman, Deputy Assistant Secretary for Population Affairs to Hilary Conner, Regional Health Administrator ("[Y]ou should not employ directive counseling in relation to abortions. A counselor working under the aegis of a physician, however, has not only a First Amendment right but duty to inform a patient of all legal options."); Memorandum of April 14, 1978 from HHS Senior Attorney Carol Conrad to Elsie Sullivan, Bureau of Community Health Services ("the provision of information concerning abortion services [and] mere referral of an individual to another provider of services for an abortion" is not prohibited); May 25, 1979 Memorandum from Louis Belmonte, Regional Program Consultant ("The provision of information on abortion services and the mere referral of a patient to another provider for such a procedure are permissible"); Memorandum of July 25, 1979 from Carol Conrad to Elsie Sullivan ("Section 59.5(d) requires referral to a provider who might recommend or provide an abortion because of the patient's medical condition or the condition of the fetus . . . where such a referral is necessary because of medical indications, abortion is not being considered as a method of family planning at all, but rather as a medical treatment . . ."). [8]

Further, the current [1981] HHS Program Guidelines For Project Grants For Family Planning Services (the "guidelines") provide:

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6 All appear in Plaintiffs' Joint Appendix to Memorandum of Law.

7 Before 1981, HHS was the Department of Health, Education and Welfare ("HEW"). All references to HHS in this opinion include, where applicable, HEW.

8 See also Memorandum of the Secretary of HHS as *amicus curiae* in *Valley Family Planning, et al. v. State of North Dakota*, 80-1471 (8th Cir. 1979) (Section 59.5(d) "includes a requirement for abortion referral services . . . In such circumstances [necessity or medically indicated], the Title X project could not, consistent with 42 CFR 59.5(d), refuse to refer the woman to another provider who would provide an abortion if in his or her own judgment it was medically indicated.")

> Pregnant women should be offered information and counseling regarding their pregnancies. Those requesting information on options for the management of an unintended pregnancy are to be given non-directive counseling on the following alternative courses of action, and referral upon request:
>
> - Prenatal care and delivery
> - Infant care, foster care, or adoption
> - Pregnancy termination

In short, HHS has significantly changed its longstanding interpretation of section 1008 with respect to referrals for abortion. Acknowledging this change, the Secretary justifies the new regulations as bringing Title X practices "into conformity with the language of the statute":

> Because counseling and referral activities are integral parts of the provision of any method of family planning, to interpret section 1008 as applicable only to the performance of abortion would be inconsistent with the broad prohibition against use of abortion as a method of family planning. 53 Fed. Reg. at 2923.

The Secretary argues that:

> Even if the abortion counseling and referral provided for by the current guidelines were not prohibited by the express language of section 1008 . . . [they] fail to offer 'clear and operational' guidance to grantees about how to preserve the distinction between Title X programs and abortion as a method of family planning. *Id.*

The Secretary's first assertion is tantamount to contending that section 1008 is only capable of one interpretation. As stated above, section 1008 does not speak to these issues unambiguously. However, that does not mean the new regulations do not give it a permissible construction.

The assertion that Title X grantees lack guidance rests upon comments received from Title X grantees in response to the Secretary's proposed rules, 52 Fed. Reg. 33210 (Sept. 1, 1987), and

reports written in 1982 by the General Accounting Office (GAO) and HHS's Office of the Inspector General. The GAO Report recommended that "the Secretary establish clear operational guidance by incorporating into the Title X program regulations and guidelines, HHS's position on the scope of the abortion restriction in section 1008." (Defendant's Memorandum, p. 16 (quoting GAO Report)) On the other hand, former HHS Secretary Heckler testified before the House Subcommittee on Health and the Environment in 1984 that "Title X grantees have been very aware and have honored the law in terms of the prohibition," H.R. Rep. No. 99-159, June 4, 1985. The present Secretary's disagreement with the conclusion reached by his predecessor, and his determination that HHS's current reading of section 1008 should be made clear, do not render the new regulations arbitrary or capricious. *Motor Vehicle*, 463 U.S. at 41.

2. Prohibition of Encouraging, Promoting or Advocating Abortion

HHS has consistently stated that Title X funds are not to be used to encourage, promote or advocate abortion. See, *e.g.*, Letter of November 19, 1976 from Louise Hellman to Hilary Conner ("if you are funded under Title X you cannot promote or encourage abortion"); Memorandum of April 14, 1978 from Carol Conrad to Elsie Sullivan (Section 1008 "prohibits activities which promote or encourage the use of abortion as a method of family planning . . . in the sense of encouraging persons to obtain abortions and the provision of transportation to persons to enable them to obtain abortions"); Memorandum of July 25, 1979 from Carol Conrad to Elsie Sullivan (a project may "make 'mere referrals' for abortion, so long as it does not then go on to promote or encourage use of the procedure for family planning purposes"). The Secretary points out that § 59.10 represents the "longstanding interpretation of section 1008 by this Department, of which the grantee community should be aware and is [sic] currently bound." 53 Fed. Reg. at 2942.

Only the restriction on "[p]aying dues to any group that as a significant part of its activities advocates abortion as a method

of family planning", § 59.10(a)(3), differs from HHS's earlier view as stated in the May 25, 1979 memorandum from Louis Belmonte ("participation in a national organization as a dues paying member, does not imply sufficient commitment to the federation's abortion activities, and thus it's allowable under Section 1008.") However, this minor departure from HHS's longstanding, general restrictions on lobbying and advocacy is not beyond the scope of the Secretary's broad discretion.

3. Separation Requirement

Some years after Title X's passage, HHS stated that "where a Title X grantee also conducts other activities which are not part of the grant-supported program and would not be permissible under the statute, . . . the grantee must ensure that the Title X-supported program is separate and is distinguishable from those other activities. Separate bookkeeping entries are not enough." (Memorandum of April 14, 1978 from Carol Conrad to Elsie Sullivan). But, "a hospital offering abortions for family planning purposes, consonant with state law" would not be barred from receiving Title X funds "for the operation of a separate family planning program which utilized only preventive family planning methods." (Memorandum of April 30, 1972 from Joel M. Mangel to Louis Hellman). Perhaps the clearest indication that HHS traditionally has not required Title X projects to be fully separate from facilities performing abortions or abortion-related services is the obvious: most Title X projects do share personnel and physical facilities with abortion clinics.

The new separation requirement, by requiring separate facilities and personnel, goes much further than prior HHS policy and imposes significant changes on Title X projects:

> Clinics with comprehensive reproductive health services and even large metropolitan hospitals cannot provide for the degree of separation called for by § 59.9. Many, if not most of such facilities have deliberately attempted to integrate services which are substantively related in the interest of efficiency and the overall convenience of staff and patients. . . . toward compliance with Title X's requirement of coordinated services and the maximization of limited financial resources.
>
> [Separate medical records mean that] the health professional in a Title X-funded program will routinely be forced to reach decisions regarding the provision of family planning treatment based on what may be an incomplete medical history. Declaration of Raymond Fink, Chairperson of MHRA.[9]

Nonetheless, the Secretary argues that unless separate facilities are maintained, Title X funds would in effect be subsidizing the performance of abortions and abortion-related activities. This determination, in light of section 1008's prohibition on using Title X funds in "programs where abortion is a method of family planning," is a permissible construction of the statute.

The foregoing review supports only the conclusions that (1) the new regulations do not offend the direction contained in section 1008; (2) nothing in the contemporaneous or subsequent legislative treatment of Title X shows with such clarity that the new regulations violate the legislative intent that they should be set aside; and (3) the new regulations, despite their significant changes from the guidelines, are supported by sufficiently reasonable grounds that they should not be set aside as arbitrary or capricious.

Accordingly, one must now turn to plaintiffs' claims that the regulations are unconstitutional.

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9 *See also* Declaration of Francine Stein, Executive Director of PPW/R (detailing the expenses of new facilities and the time required to obtain operating certificates); Declaration of Dr. Irving Rust (explaining that the "proximity of services and personnel" enables Title X program to counsel immediately post abortion patients "to encourage a responsible attitude toward sex and reproductive health"); Declaration of Lorraine Tiezzi, Director of family planning clinics at Presbyterian Hospital (although "[a]bortions are performed at Presbyterian Hospital on a separate floor", the "family planning clinic and abortion services are both part of the OB-GYN clinic, and thus share the same entrance, and waiting and reception areas" as well as patient records); Declaration of Marilyn Bennett, Executive Director of Hudson Health ("our family planning program would have to be physically separated from our maternal/infant program in which the option of abortion is often discussed following genetic counseling and amniocentesis").

II. Constitutional Claims

A. Counseling and Referral Prohibition; Prohibition of Encouraging, Advocating, or Lobbying of Abortion

Both the federal and state governments may "make a value judgment favoring childbirth over abortion, and . . . implement that judgment by the allocation of public funds." *Maher v. Roe*, 432 U.S. 464, 474 (1977). As stated in *Harris v. McRae*, 448 U.S. 297, 314 (1980):

> The doctrine of *Roe v. Wade*, the Court held in *Maher*, "protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy," *id.* at 473-474, 97 S. Ct. at 2382, such as the severe criminal sanctions at issue in *Roe v. Wade*, *supra*, or the absolute requirement of spousal consent for an abortion challenged in *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 96 S. Ct. 2831, 49 L.Ed.2d. 788.
>
> But the constitutional freedom recognized in *Wade* and it progeny, the *Maher* Court explained, did not prevent Connecticut from making "a value judgment favoring childbirth over abortion, and . . . implement[ing] that judgment by the allocation of public funds." 432 U.S., at 474, 97 S. Ct., at 2382. As the Court elaborated:
>
> "The Connecticut regulation before us is different in kind from the laws invalidated in our previous abortion decisions. The Connecticut regulation places no obstacles—absolute or otherwise—in the pregnant woman's path to an abortion. An indigent woman who desires an abortion suffers no disadvantages as a consequence of Connecticut's decision to fund childbirth; she continues as before to be dependent on private sources for the services she desires. The State may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to abortions that was not already there. The indigency that may make it difficult—and in some cases, perhaps, impossible—for some women to have abortions is neither created nor in any way affected by the Connecticut regulation." *Ibid.*

In sum:

> There is a basic difference between direct state interference with a protected activity and state encouragement of an alternate activity consonant with legislative policy. Constitutional concerns are greatest when the State attempts to impose its will by force of law; the State's power to encourage actions deemed to be in the public interest is necessarily far broader. *Maher v. Roe*, 432 U.S. at 475-76 (footnote omitted).

Here the question is whether the regulations interfere with constitutionally protected rights (claimed to be the Title X health providers' First Amendment right to counsel their patients and their patients' First and Fifth Amendment rights to receive information about abortion services) or simply allocate financial support to those who do not counsel about abortion but encourage childbirth.

Both *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 546 (1983) and *Lyng v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America*, 108 S. Ct. 1184, 1190 (1988) "reject the notion that First Amendment rights are somehow not fully realized unless they are subsidized . . ." The Court cautioned, however, that "[t]he case would be different if Congress were to discriminate invidiously in such a way as to 'aim at the suppression of dangerous ideas.' " *Taxation With Representation*, 461 U.S. at 548. Plaintiffs argue that by requiring Title X grantees to supply pregnant clients with a list of prenatal care providers and forbidding them to counsel about abortion services, the new regulations are "selective prohibitions about what may be said [which] may not be viewed as a mere refusal to subsidize the exercise of rights." (Plaintiffs' Joint Response to Defendant's Second Notice of Recent Decision, p. 3)

The regulations reflect the Secretary's decision to favor childbirth over abortion and section 1008's requirement that no Title

X funds be used in programs where abortion is a method of family planning. Counseling women who seek family planning assistance, and who are not yet pregnant, about abortion treats abortion as a method of family planning. Congress has already forbidden funding for that purpose, a choice which can hardly be argued to have "interfered" with free speech.

More troubling is the Secretary's requirement that pregnant women be given a list, which may be biased in favor of providers of prenatal care, in response to their queries about abortion services. If that requirement were imposed upon all health care providers (whether or not supported by government funds) by law, or if any providers were penalized for speaking of abortions, that would constitute invidious discrimination of ideas. *Cf. Griswold v. Connecticut*, 381 U.S. 479 (1965). But here, the regulation simply defines who may, and who may not, receive Title X funds. The condition that federal funds will be given only to those who support particular views does not violate constitutional rights. *See, e.g., Taxation With Representation*, 461 U.S. at 548 ("Congress could, for example, grant funds to an organization dedicated to combating teenage drug abuse but condition the grant by providing that none of the money received from Congress should be used to lobby state legislatures.")

FCC v. League of Women Voters of California, 468 U.S. 364 (1984), on which plaintiffs rely, does not compel a different result. Striking a provision of the Public Broadcasting Act of 1967 forbidding any noncommercial educational radio or television station which receives grants from "engaging in editorializing," the Court stated:

> We do not hold that the Congress or the FCC is without power to regulate content, timing, or character of speech by noncommercial educational broadcasting stations. Rather, we hold only that the specific interests sought to be advanced by [the] ban on editorializing are either not sufficiently substantial or are not served in a sufficiently limited manner to justify the substantial abridgment of important journalistic freedoms which the First Amendment jealously protects. *Id.* at 403.

Thus, even where the First Amendment freedoms of a broadcasting medium whose sole purposes are the dissemination of ideas and public discussion of issues are at stake, neither Congress nor an agency is entirely "without power to regulate" content, timing, and character of speech.

The point here, however, is that HHS's regulations, which merely withhold grants of federal funds from those who wish to counsel women about abortion, refer them to abortion providers, or advocate, encourage or promote abortion in other ways, do not violate the rights of either such persons or their patients. The regulations do not prohibit or compel speech. They grant money to support one view and not another; but that is quite different from infringing on free speech.

B. Separation Requirement

The Secretary argues that the new regulations are "constitutional under the standards set forth in *Regan v. Taxation Without (sic) Representation, supra* and *League of Women Voters, supra*, because they do not prohibit organizations from establishing affiliates that provide abortion materials." *Id.* at 2942-43.

In *Taxation With Representation* the Court rejected a First Amendment challenge to an Internal Revenue Code section which prohibits use of tax-deductible contributions for lobbying. The Court noted that the organization could set up two groups: one to engage in lobbying, and another eligible for tax-deductible contributions for its nonlobbying activity. *Id.* at 544. The Court held that the IRS requirement "that the two groups [the lobbying division and the non-lobbying division] be separately incorporated and keep records adequate to show that tax-deductible contributions are not used to pay for lobbying . . . . is not unduly burdensome." *Id.* at 544 n.6.

Maintaining separate signs, forms of identification, and accounting records, as in *Taxation With Representation*, does not impose unduly burdensome restrictions on Title X grantees. The requirements of separate personnel and facilities go considerably further than the separation requirements at issue in *Taxation With Representation* or those suggested in *League of*

Women Voters. However, the Secretary's view that these regulations are necessary to assure compliance with the other regulations is not unreasonable. Although the regulations do impose a burden upon Title X programs, the burden is not so excessive as to infringe plaintiffs' constitutional rights.

Nor do the regulations infringe upon the grantees' rights to exercise free speech in programs supported by funds from other sources. The Secretary declines to contribute funds to programs counseling about abortion. Title X grantees are free to engage in such programs, supported by funds from others, as long as those programs are kept separate from their Title X activities. That arrangement is valid. See *League of Women Voters*, 468 U.S. at 400.

> Of course, if Congress were to adopt a revised version of § 399 that permitted noncommercial educational broadcasting stations to establish 'affiliate' organizations which could then use the station's facilities to editorialize with nonfederal funds, such a statutory mechanism would plainly be valid under the reasoning of *Taxation With Representation*.

CONCLUSION

Plaintiffs' motion for summary judgment is denied, and defendant's motion for summary judgment is granted.

The Clerk will enter judgment dismissing the complaints, together with costs and disbursements as provided by law.

Dated: June 30, 1988
New York, New York

/s/ LOUIS L. STANTON
Louis L. Stanton
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

88 Civ. 0701, 0702 (LLS)

THE STATE OF NEW YORK, et al.,

Plaintiffs,

—against—

LOUIS SULLIVAN, Secretary of the United States Department of Health and Human Services,

Defendant.

DR. IRVING RUST, et al.,

Plaintiffs,

—against—

LOUIS SULLIVAN, Secretary of the United States Department of Health and Human Services,

Defendant.

ORDER

Plaintiffs having moved, pursuant to Fed. R. Civ. P. 62(c), for an order staying enforcement of the challenged Title X regulations, 53 Fed. Reg. 2944-46 (Feb. 2, 1988), pending appeal of this court's decision, *State of New York v. Bowen*, 690 F. Supp. 1261 (S.D.N.Y. 1988), and the court having considered the written submissions and oral argument of counsel and having rendered its decision in open court, and it appearing that (1) plaintiffs have established "a substantial possibility, although less than a likelihood, of success" on appeal, *Hayes v. City University of New York*, 503 F. Supp. 946, 963 (S.D.N.Y.

1981), (2) in the event of reversal, plaintiffs would have suffered substantial injury from enforcement of the regulations against them in the interim, and (3) in the event of affirmance, the Secretary will have suffered the loss of funds to an application which he regards as improper and a delay in the exercise of his right to put his own decisions into effect; however, the Secretary's predecessors made the grants which plaintiffs seek to preserve pending the determination of the appeal, and since they were considered appropriate before the current regulations were promulgated, the Secretary's and the public interest will not be substantially harmed by their continuation until the Court of Appeals for the Second Circuit reaches its decision in *State of New York v. Bowen*, No. 88-6204, and *Rust v. Bowen*, No. 88-6206, it is

ORDERED that plaintiffs' Title X grant award date is extended until twenty days after the Court of Appeals renders its decision in *State of New York v. Bowen*, No. 88-6204, and *Rust v. Bowen*, No. 88-6206, or until December 1, 1989, whichever occurs earlier.

Dated: September 5, 1989
New York, New York

/s/ LOUIS L. STANTON
Louis L. Stanton
U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 575, 633—August Term, 1988

(Argued January 4, 1989 Decided November 1, 1989)

Docket Nos. 88-6204, 88-6206

THE STATE OF NEW YORK, THE CITY OF NEW YORK, THE NEW YORK CITY HEALTH & HOSPITALS CORP., DR. IRVING RUST, on behalf of himself, his patients and all others similarly situated, DR. MELVIN PADAWER, on behalf of himself, his patients, and all others similarly situated, MEDICAL AND HEALTH RESEARCH ASSOCIATION OF NEW YORK CITY, INC., PLANNED PARENTHOOD OF NEW YORK CITY, INC., PLANNED PARENTHOOD OF WESTCHESTER/ROCKLAND, and HEALTH SERVICES OF HUDSON COUNTY, NEW JERSEY,

Plaintiffs-Appellants,

—v.—

DR. LOUIS SULLIVAN, or his successor, Secretary of the United States Department of Health and Human Services,

Defendant-Appellee.

Before:

KEARSE, CARDAMONE and WINTER,
Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York (Louis L. Stanton, *Judge*) upholding regulations promulgated by the Secretary of the Department of Health and Human Services implementing the prohibition in Title X of the Public Health Service Act, 42

U.S.C. §§ 300 *et seq.*, on the use of Title X funds in programs in which abortion is a method of family planning. We hold that the regulations: (i) are based on a permissible construction of the statute and are therefore within the Secretary's authority; and (ii) are constitutional.

Affirmed.

Judge Kearse dissents in part in a separate opinion. Judge Cardamone concurs in a separate opinion.

SUZANNE LYNN, Assistant Attorney General, Chief, Civil Rights Bureau, New York State Department of Law, New York, New York (Robert Abrams, Attorney General of the State of New York, Marla Tepper, Assistant Attorney General, New York, New York, of counsel), *for Plaintiff-Appellant The State of New York.*

RACHEL N. PINE, New York, New York (Janet Benshoof, Lynn Paltrow, Catherine Weiss, American Civil Liberties Union, New York, New York; Norman Siegel, Art Eisenberg, New York Civil Liberties Union, New York, New York; Laurie R. Rockett, Hollyer, Jones, Brady, Smith Troxwell, Barrett & Chira, New York, New York, of counsel), *for Plaintiffs-Appellants Dr. Irving Rust, Dr. Melvin Padawer, Medical and Health Research Association of New York City, Inc., Planned Parenthood of New York City, Inc., Planned Parenthood of Westchester/ Rockland, and Health Services of Hudson County, New Jersey.*

Peter Zimroth, Corporation Counsel, The City of New York, New York, New York (Lorna Bade Goodman, Assistant Corporation Counsel, Chief, Affirmative Litigation Division, Hillary Weisman, Assistant Corporation Counsel, The City of New York, New York, New York, of counsel), *for Plaintiffs-Appellants The City of New York and The City of New York Health and Hospitals Corporation.*

ALFRED MOLLIN, Attorney, Appellate Staff, Civil Division, Department of Justice, Washington, D.C. (John R. Bolton, Assistant Attorney General, John F. Cordes, Attorney, Appellate Staff, Civil Division, Department of Justice, Washington, D.C.; Rudolph W. Giuliani, United States Attorney for the Southern District of New York, New York, New York, Joel Mangel, Deputy Chief Counsel, Public Health Service, Carol Conrad, Attorney, Office of the General Counsel, Department of Health and Human Services, Washington, D.C., of counsel), *for Defendant-Appellee.*

(Kent Masterson Brown, Lexington, Kentucky, Michael Vaccari, New York, New York, and Clarke D. Forsythe, Americans United for Life Legal Defense Fund, Chicago, Illinois, of counsel, submitted a brief *in Support of Appellee* for amici curiae American Academy of Medical Ethics; Association of American Physicians & Surgeons; American Association of Pro Life Obstetricians and Gynecologists; American Association of Pro-life Pediatricians, National Doctors for Life, Christian Medical Society, Christian Medical Foundation, Alabama Physicians for Life, Physicians for Moral Responsibility, National Association of Pro-life Nurses, California Pro-life Nurses Association, Georgia Nurses for Life, Indiana Nurses Concerned for Life, Missouri Nurses for Life, New York State Nurses for Life, Inc., Pennsylvania Nurses for Life, Rhode Island Nurses for Life, Washington Pro-life Nurses Association, Southern Center for Law and Ethics, and Certain Fellows and Members of the American College of Obstetricians and Gynecologists and of the American Medical Association).

(Kirk B. Johnson, Edward B. Hirshfeld, American Medical Association, Chicago, Illinois, Ann E. Allen, American College of Obstetricians and Gynecologists, Washington, D.C., Jack R. Bierig, David F. Graham, Lynn D. Fleisher, and Richard D. Raskin, Sidley & Austin, Chicago, Illinois, of counsel, submitted a brief *in Support of Appellants* for amici curiae the American Medical Association, American College of Obstetricians and Gynecologists, and American Society of Human Genetics).

(Bruce S. Wolff, Charles S. Sims, Suzette Brooks and William S. Koenig, Proskauer Rose Goetz & Mendelsohn, New York, New York, of counsel, submitted a brief *in Support of Appellants* for amici curiae the American Public Health Association, the Association of State and Territorial Health Officers, the Association of Schools for Public Health, the American College of Physicians, the American Medical Student Association, the Association of Reproductive Health Professionals, the California Coalition of Nurse Practitioners, the Maryland Department of Health and Mental Hygiene, the National Association of Nurse Practitioners in Family Planning, the National Urban League, the Nurses Association of the American College of Obstetricians and Gynecologists, the Ohio Department of Health, the Wisconsin Nurse Practitioners in Reproductive Health, and Dr. Allan Rosenfield, Dean of the Columbia University School of Public Health).

(Jonathan Lang, Ann Barcher, Barry Ensminger, Janice Goodman, Mary Sue Henifin, Kent Hirozawa, Susan Waltman and Sheldon Oliensis, President, the Association of the Bar of the City of New York, New York, New York, of counsel, submitted a brief *in Support of Appellants* for amicus curiae the Committees on Civil Rights, Medicine and Law, and Sex and Law of the Association of the Bar of the City of New York).

(Julius L. Chambers, Charles S. Ralston, John C. Dubin, Sherrilyn A. Ifill and Charlotte B. Rutherford, NAACP Legal Defense and Educational Fund, Inc., New York, New York, of counsel, submitted a brief *in Support of Appellants* for amicus curiae NAACP Legal Defense and Educational Fund, Inc.).

(Nadine Taub, Rutgers University School of Law, Newark, New Jersey, Sarah E. Burns, Legal Director, NOW Legal Defense and Education Fund, New York, New York, John H. Hall, Walter J. Walsh and Joel Kosman, Debevoise & Plimpton, New York, New York, of counsel, submitted a brief *in Support of Appellants* for amici curiae NOW

Legal Defense and Education Fund, National Abortion Rights Action League, American Association of University Women, American Humanist Association, American Jewish Congress, Americans for Religious Liberty, Catholics for a Free Choice, Center for Population Options, Committee to Defend Reproductive Rights, Episcopal Women's Caucus, Equal Rights Advocates, Inc., National Abortion Federation, National Council of Jewish Women, National Emergency Civil Liberties Committee, National Organization for Women, National Women's Health Network, National Women's Political Caucus, Organization of Pan-Asian American Women, Public Citizen Health Research Group, United Church of Christ, Women's Equity Action League, Women's Law Project; Women's Legal Defense Fund, Young Women's Christian Association of U.S.A.).

(David M. Becker and Virginia A.S. Kling, Wilmer, Cutler & Pickering, Washington, D.C., of counsel, submitted a brief *in Support of Appellants* for amici curiae Representative Bill Green, Senators Barbara A. Mikulski, Lowell P. Weicker, Jr., Brock Adams, John H. Chafee, Alan Cranston, Howard M. Metzenbaum, Paul Simon, Robert T. Stafford, William S. Cohen, Daniel J. Evans, Bob Packwood, and Timothy E. Wirth, and Representatives Daniel K. Akaka, Les AuCoin, Julian C. Dixon, Vic Fazio, William H. Gray III, Steny H. Hoyer, William Lehman, Robert J. Mrazek, John Edward Porter, Martin Olav Sabo, Henry A. Waxman, Jim Bates, Rick Boucher, Cardiss Collins, Mickey Leland, James H. Scheuer, Ron Wyden, Gary L. Ackerman, Chester G. Atkins, Anthony C. Beilenson, Howard L. Berman, Sherwood L. Boehlert, Don Bonker, Barbara Boxer, George E. Brown, Jr., Albert G. Bustamante, Benjamin L. Cardin, Thomas R. Carper, George W. Crockett, Jr., Peter A. DeFazio, Ronald V. Dellums, Mervyn M. Dymally, Don Edwards, Lane Evans, Dante B. Fascell, Walter E. Fauntroy, Barney Frank, Bill Frenzel, Robert Garcia, Sam Gejdenson, Benjamin A. Gilman, Charles A. Hayes, James M. Jef-

fords, Nancy L. Johnson, Robert W. Kastenmeier, Joseph P. Kennedy II, Peter H. Kostmayer, Richard H. Lehman, Sander M. Levin, Mel Levine, John Lewis, Mike Lowry, Matthew G. Martinez, Robert T. Matsui, George Miller, John R. Miller, Jim Moody, Constance A. Morella, Bruce A. Morrison, Stephen L. Neal, Nancy Pelosi, Claude Pepper, Charles B. Rangel, Marge Roukema, Claudine Schneider, Patricia Schroeder, Christopher Shays, David E. Skaggs, Louise M. Slaughter, Lawrence J. Smith, Olympia J. Snowe, Stephen J. Solarz, Pete Stark, Gerry E. Studds, Edolphus Towns, Morris K. Udall, Ted Weiss, Alan Wheat, and Howard Wolpe).

(Mark E. Chopko, General Counsel and Helen M. Alvare, Attorney, United States Catholic Conference, Washington, D.C., of counsel, submitted a brief *in Support of Appellee* for amicus curiae the United States Catholic Conference).

(James Bopp, Jr., and Richard E. Coleson, Brames, McCormick, Bopp & Abel, Terre Haute, Indiana, of counsel, submitted a brief *in Support of Appellee* for amici curiae United States Senator Gordon J. Humphrey and United States Congressmen Thomas J. Tauke, Thomas A. Luken, Thomas J. Bliley, Dan Coats, Christopher H. Smith, Henry J. Hyde, Alan B. Mollohan, and Vin Weber).

WINTER, *Circuit Judge*:

This appeal involves the validity of regulations promulgated by the Secretary of Health and Human Services (the "Secretary"). The statutory authority for these regulations is Section 1008, 42 U.S.C. § 300a-6, of Title X of the Public Health Service Act, 42 U.S.C. §§ 300 to 300a-41 (1982 & Supp. V 1987) ("Title X"). Section 1008 states: "None of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6. The regulations in question were promulgated in early 1988 and constitute a divergence from past agency policy. The new regulations limit the activities of Title X grantee projects with regard to counseling and referral for abortion, require physical and financial separation of Title X projects from prohibited activities, and restrict advocacy concerning abortions by Title X projects.

In challenging the new regulations, plaintiffs raise three principal issues: (i) whether the regulations are consistent with Section 1008; (ii) whether the prohibition on counseling concerning abortion within Title X projects violates the First and Fifth Amendment rights of pregnant women; and (iii) whether the regulations on counseling and advocacy infringe the First Amendment rights of health care providers. We hold that the regulations in question are a permissible construction of the statute and do not violate the constitutional rights of women or Title X grantees.

BACKGROUND

The facts are not in dispute and are amply described in the district court opinion, *State of New York v. Bowen*, 690 F. Supp. 1261 (S.D.N.Y. 1988), familiarity with which is assumed. A brief recounting will therefore suffice for purposes of this opinion. Title X of the Public Health Service Act, 42 U.S.C. §§ 300 to 300a-41 authorizes the Secretary to make grants to public and private nonprofit entities to establish and operate family planning projects. It is the single largest source of fed-

eral funding of family planning services. Appellants include a number of Title X grantees—the State of New York, which receives Title X funds through the New York State Department of Health; the City of New York; the New York City Health and Hospitals Corporation; Planned Parenthood of New York City, Inc.; Planned Parenthood of Westchester/Rockland; Medical and Health Research Association of New York City, Inc.; Health Services of Hudson County, New Jersey; and Dr. Irving Rust and Dr. Melvin Padawer, doctors who supervise Title X-funded programs, who are suing on behalf of themselves and their patients. The defendant is the Secretary of the Department of Health and Human Services.

The Secretary has the power to make Title X grants "in accordance with such regulations as [he] may promulgate." 42 U.S.C. § 300a-4(a). On February 2, 1988, the Secretary promulgated the regulations in question pursuant to Section 1008. The new regulations impact on counseling concerning abortion, geographic and administrative relationships between Title X grantees and those engaging in activities concerning abortion, and advocacy concerning abortion. There is little doubt that the new regulations were intended as a departure from prior administrative practice. While Title X funds were never permitted in the past to be used either to perform or to subsidize actual abortions, *see* 36 Fed. Reg. 18,465, 18,466 (1971) (codified at 42 C.F.R. § 59.5(a)(9) ("The project will not provide abortion as a method of family planning."); *see also* 42 C.F.R. § 59.5(a)(5) (1986), administrative interpretations at first permitted, and later required, Title X projects to provide information about, and referral for, abortions, including names and addresses of abortion clinics. *See* U.S. Dep't of Health, Educ. & Welfare, *Program Incentives for Project Grants for Family Planning Services* (Jan. 1976); U.S. Dep't of Health and Human Services, *Program Guidelines for Project Grants for Family Planning Services* § 8.6 (1981). Title X programs thus included "non-directive" counseling about abortion as a method of family planning. Abortion-related activities permissible under the earlier practice have been summarized as follows:

> [T]he provision of information concerning abortion services, mere referral of an individual to another provider of services for an abortion, and the collection of statistical data and information regarding abortion are not considered to be proscribed by § 1008. The provision of "pregnancy counseling" in the sense of encouraging persons to obtain abortions and the provision of transportation to persons to enable them to obtain abortions, on the other hand, are considered to be proscribed by § 1008. The test to be applied, then, appears to be whether the immediate effect of the activity in question is to encourage or promote the use of abortion as a method of family planning. If the immediate effect of the activity is essentially neutral as in the cases of mere referral or collection of statistical data, then the activity does not fall afoul of § 1008.

Memorandum from C. Conrad, Office of the General Counsel, Department of Health, Education and Welfare, to E. Sullivan (Apr. 14, 1978) (footnotes omitted) (reproduced in Brief of the Secretary of Health and Human Services as Amicus Curiae at Attachment B, *Valley Family Planning v. North Dakota*, 661 F.2d 99 (8th Cir. 1981) (No. 80-1471) [hereinafter Memorandum of Apr. 14, 1978].

The new regulations expressly prohibit those activities that "assist" a woman to obtain an abortion, while not interfering with the right to receive information about abortion from sources other than Title X projects. *See* 42 C.F.R. § 59.10 (1988); *see also* 53 Fed. Reg. 2941-42 (1988). The regulations thus curtail counseling, non-directive or not, by Title X projects concerning abortion. In attempting to "set specific standards for compliance with the statutory requirement that none of the funds appropriated under Title X may be used in programs where abortion is a method of family planning," 53 Fed. Reg. 2922 (1988), Section 59.8(a)(1) of the regulations states that "[a] Title X project may not provide counseling concerning the use of abortion as a method of family planning." 42 C.F.R. § 59.8(a)(1) (1988). Section 59.8(a)(3) goes on to explain:

> (3) A Title X project may not use prenatal, social service or emergency medical or other referrals as an indirect means of encouraging or promoting abortion as a method of family planning, such as by weighing the list of referrals in favor of health care providers which perform abortions, by including on the list of referral providers health care providers whose principal business is the provision of abortions, by excluding available providers who do not provide abortions, or by "steering" clients to providers who offer abortion as a method of family planning.

42 C.F.R. § 59.8(a)(3) (1988). The regulations thus allow a service provider to respond to a client's inquiry for information about abortion by furnishing the name of abortion providers, but only in a prescribed fashion. After a client is diagnosed as pregnant, "the project refers the woman for prenatal pregnancy care rather than providing 'options counseling,' which could violate section 1008 by influencing her choice toward abortion." 53 Fed. Reg. 2932 (1988). The discussion accompanying the new regulations explains that the limitations on "conscious weighting" of the referral lists does not prohibit the "inclusion of facilities, such as hospitals, in which abortions are performed if they are also major providers of prenatal care and other services and the referral is specifically made to the providers of prenatal care services." 53 Fed. Reg. 2938 (1988). The provision does, as noted, ban inclusion of providers whose "main function" is to provide abortions. *Id.*

Subsection (4) states that the regulations do not prohibit provision of information "medically necessary to assess the risks and benefits of different methods of contraception," provided no counseling with respect to abortion is furnished. 42 C.F.R. § 59.8(a)(4) (1988). Specifically, keeping on hand copies of the yellow pages that contain advertisements for and information on where to obtain an abortion, to be given to a client who asks for them, is permitted: "[K]eeping the yellow pages in the project office and provision of medical records to another medical provider would not be proscribed, as they are not actions that

directly 'assist' a woman to obtain an abortion." 53 Fed. Reg. 2942 (1988).[1]

The second area of change under the new regulations concerns "program integrity." Section 59.9 provides that "[a] Title X project must be organized so that it is physically and financially separate" and "must have an objective integrity and independence from prohibited activities." 42 C.F.R. § 59.9 (1988). The integrity and independence of Title X projects are to be evaluated on a case-by-case basis. That evaluation will take into account, *inter alia*, whether separate accounting records are maintained, whether facilities in which prohibited activities occur are physically separate from Title X facilities, and whether the personnel in the Title X project also serve in projects in which prohibited activities occur. 42 C.F.R. § 59.9(a)-(d) (1988).

The third area relates to advocacy concerning abortion. Section 59.10 prohibits the use of Title X funds for activities that "encourage, promote or advocate abortion," and sets forth the following guidelines, illustrated with examples:

> (a) A Title X project may not encourage, promote or advocate abortion as a method of family planning. This requirement prohibits actions to assist women to obtain abortions or increase the availability or accessibility of abortion for family planning purposes. Prohibited actions include the use of Title X project funds for the following:
>
> (1) Lobbying for the passage of legislation to increase in any way the availability of abortion as a method of family planning;

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1 I do not agree with my colleagues that the regulations at issue permit the "keeping," but not the "providing," of the yellow pages to a client who asks for them. The sentence they refer to is contained in the discussion accompanying the new regulations and uses the word "keeping," not as a limiting concept, but as a response to a criticism that the regulations would prohibit "even keeping copies of the telephone yellow pages which contain advertisements by abortion clinics." 53 Fed. Reg. 2922, 2941 (1988). I believe it fairly self-evident that this response makes no sense if the yellow pages may not be provided when requested, particularly since neither the regulations nor the discussion explicitly prohibits their provision upon request.

(2) Providing speakers to promote the use of abortion as a method of family planning;

(3) Paying dues to any group that as a significant part of its activities advocates abortion as a method of family planning;

(4) Using legal action to make abortion available in any way as a method of family planning; and

(5) Developing or disseminating in any way materials (including printed matter and audiovisual materials) advocating abortion as a method of family planning.

42 C.F.R. § 59.10(a) (1988).

Appellants filed two separate actions, *New York v. Bowen*, No. 88-0701, and *Rust v. Bowen*, No. 88-0702, later consolidated, seeking declaratory and injunctive relief to prevent implementation of the new regulations. Appellants argued that the new regulations violated the letter and intent of Title X and worked a deprivation of First and Fifth Amendment rights. In a thorough opinion, the district court rejected appellants' contentions and upheld the regulations. Despite the Secretary's departure from past interpretations, the district court found the new regulations to be supported by "sufficiently reasonable grounds that they should not be set aside as arbitrary or capricious." *State of New York v. Bowen*, 690 F. Supp. at 1272. Similarly, the district court found appellants' constitutional claims to lack merit, holding that the regulations did not impermissibly interfere with either patients' First and Fifth Amendment rights to receive information about abortion services, *id.* at 1272-74, or Title X grantees' First Amendment rights to engage in speech concerning abortion.

DISCUSSION

1. *Statutory Issues*

We first examine whether the regulations in question embody a construction of the statute that legitimately effectuates Congressional intent. *See Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). Under Title X, the Secretary is empowered to make grants and enter into con-

tracts "to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services." 42 U.S.C. § 300(a). His discretion, however, is subject to the restriction of Section 1008 that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6. We believe that Section 1008 authorizes the regulations in question.

Appellants contend that the statute proscribes only the providing for, or the funding of, the performance of abortions and that the Secretary may not prohibit abortion counseling. This is a highly strained construction of Section 1008. A principal function of grantees under Title X is to provide information or "counseling" as to a range of methods of family planning. A program that counsels use of a particular contraceptive device plainly treats that device as a "method of family planning." In this context, it would be wholly anomalous to read Section 1008 to mean that a program that merely counsels but does not perform abortions does not include abortion as a "method of family planning." Moreover, when Congress has sought to prohibit the use of federal funds to perform actual abortions, it has used language specifically tailored to that end. *See, e.g.*, Pub. L. No. 100-202, 101 Stat. 1329-99 (1987) ("Hyde Amendment" to appropriations act stating: "None of the Federal funds provided in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term . . . ."). In the present context, the natural construction of Section 1008 is that the term "method of family planning" includes counseling concerning abortion.

Nothing in the legislative history of Title X detracts from that conclusion. The Conference Report thus stated that "[i]t is, and has been, the intent of both Houses that the funds authorized under [Section 1008] be used only to support preventive family planning services, population research, infertility services, and other related medical, informational, and educational activities. The conferees have adopted the language contained in section 1008, which prohibits the use of such funds for abortion, in order to make clear this intent." Conf. Rep. No. 91-1667, 91st

Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Admin. News 5080, 5081-82. The comments of a number of legislators similarly support the Secretary's position. *See, e.g.*, 116 Cong. Rec. 37,375 (1970) (remarks of Rep. Dingell) ("During the course of House hearings . . . there was some confusion regarding the nature of the family planning programs envisioned, whether or not they extended to include abortion as a method of family planning. With the 'prohibition of abortion' amendment—title X, section 1008—the committee members clearly intend that abortion is not to be encouraged or promoted in any way through this legislation."); 116 Cong. Rec. 37,371 (1970) (statement of Rep. Pickle) ("I strongly support . . . the provision in the House version of this legislation that prevents this bill from being construed as support for abortion.").

Appellants' contrary view of the legislative history is based entirely on highly generalized statements about the expansive scope of the family planning services intended to be provided by Title X grantees. *See, e.g.*, S. Rep. No. 1004, 91st Cong., 2d Sess. 3, *excerpted in* 116 Cong. Rec. 24,094 (1970) ("This legislation is designed to make comprehensive, voluntary family planning services, and information relating thereto, readily available to all persons in the United States desiring such services; to provide greatly increased support for biomedical, behavioral, and operational research relevant to family planning and population; to develop and disseminate information on population growth; and to coordinate and centralize the administration of family planning and population research programs conducted by the Department of Health, Education and Welfare."); *id.* at 10, 116 Cong. Rec. at 24,095-96 ("The committee does not view family planning as merely a euphemism for birth control. It is properly a part of comprehensive health care and should consist of much more than the dispensation of contraceptive devices."); 116 Cong. Rec. 37,370 (1970) (statement of Rep. Bush) ("Most important is that this legislation be recognized as . . . a health-care service mechanism and not a population control mechanism."); 116 Cong. Rec. 37,380 (statement of Rep. Kyros) ("[This legislation] will make an important contribution to the health of American mothers and

children. This bill will make family planning services available to low-income women who presently want and need but cannot afford them and will increase the federal role in population research."); 116 Cong. Rec. 24,093 (statement of Sen. Hart) (legislation "moves toward providing much needed medical family planning services to millions of women who cannot afford them, and it provides for the research that will help us better to understand the phenomena of population growth and enable all couples to regulate fertility according to their individual conscience"). Whatever force such generalized statements might have in the absence of Section 1008, however, they do not specifically mention counseling concerning abortion as an intended service of Title X projects, and they surely cannot be read to trump a section of the statute that specifically excludes it. *See Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of America*, 325 U.S. 161, 168-69 (1945) (general remarks not probative of Congressional intent on narrow issue).

Similarly, we are unpersuaded that subsequent refunding of Title X by later Congresses is significant in the instant case. *Cf. Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 190-93 (1978) (subsequent appropriation irrelevant to previously enacted substantive law). Congress has not reenacted Title X, and the reauthorization of funding[2] does not imply that Congress was aware of, much less endorsed, every expenditure of funds by the agency. Reauthorization, for example, may simply imply acquiescence in the exercise of discretion by the agency. General statements by members of Congress at the time of refunding, *see, e.g.*, 119 Cong. Rec. 9593 (1973) (statement of Sen. Pell) (urging extension of funding and noting that "these programs seem to be working well"); 124 Cong. Rec. 31,252 (1978) (state-

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2 Title X was extended through fiscal year 1974 by Pub. L. No. 93-45, 87 Stat. 91 (1973). It was reauthorized in 1975, Pub. L. No. 94-63, 89 Stat. 304 (1975); again in 1977, Pub. L. No. 95-83, 91 Stat. 383 (1977); again in 1978, Pub. L. No. 95-613, 92 Stat. 3093 (1978); again in 1981, Pub. L. No. 97-35, 95 Stat. 358 (1981); and again in 1984, Pub. L. No. 98-512, 98 Stat. 2409 (1984). *See* H.R. Rep. No. 159, 99th Cong., 1st Sess. 2 (1985) (summarizing history). Since 1985 the Title X program has been funded through a series of continuing resolutions.

ment of Rep. Rogers), are similarly unenlightening. Moreover, " 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.' " *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980) (quoting *United States v. Price*, 361 U.S. 304, 313 (1960)). "[E]ven when it would otherwise be useful, subsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment." *Consumer Prod. Safety Comm'n v. GTE Sylvania*, 447 U.S. at 118 n.13.

In addition, the rejection by Congress of proposed amendments to Title X specifically prohibiting funds for counseling and referral for abortion, *see* H.R. Rep. No. 159, 99th Cong., 1st Sess. 6-7 (1985); 124 Cong. Rec. 37,045-46 (1978), is not helpful to interpretation because Congress may have believed that the statute already provided for such a result. *See* 124 Cong. Rec. 37,046 (1978) (statement of Rep. Rogers) ("[T]he point of what we are doing in title X . . . is to let people know how to avoid pregnancy. We cannot use any funds for abortion. The amendment is not needed."); *see also* 120 Cong. Rec. 21,688 (1974) (remarks of Rep. Roncallo); 124 Cong. Rec. 31,238 (1978) (statement of Rep. Rogers) ("simple extension" of Title X is not a "pro-abortion vote"). Finally, the existence of a lengthy political debate in Congress over the last several years on the general subject of funding for counseling and referral for abortion, *see* Appellants' Br. at 35-36, is not a reason for courts to alter their interpretation of Title X as enacted.

Appellants next argue that the Secretary is bound by prior administrative constructions of the statute and may not, therefore, promulgate regulations diverging significantly from past practice, even if the Secretary determines that practice was at odds with Congressional intent. The fact that an agency is departing from a long-held prior interpretation is of course an item to be taken into account by a court reviewing agency actions. Such a departure does not of course entitle a court to eschew all deference to the agency's judgment. Indeed, the Supreme Court has directly held that courts must show some deference to a rescission or modification of regulations as well as to an agency's initial interpretation. *Motor Vehicle Mfrs.*

Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 41 (1983). In *American Trucking Ass'n v. Atchison, Topeka & S.F. Ry. Co.*, 387 U.S. 397 (1967), for example, the Supreme Court upheld the authority of the Interstate Commerce Commission to alter an interpretation of a statute that it had followed for some twenty-five years on the ground that it had decided that interpretation was incorrect. The Court remarked that an agency "faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice." 387 U.S. at 416. Similarly, in *Chevron*, the Supreme Court rejected the argument that an agency's interpretation "is not entitled to deference because it represents a sharp break with prior interpretations of the [statute in question]." *Chevron*, 467 U.S. at 862. Such revised interpretation deserves deference because "[a]n initial agency interpretation is not instantly carved in stone" and "the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis." *Id.* at 863-64.

We recently applied these principles in *Securities Indus. Ass'n v. Board of Governors of the Federal Reserve System*, 839 F.2d 47 (2d Cir.), *cert. denied*, 108 S. Ct. 2830 (1988), in which we upheld an outright reversal of regulatory policy based on the Federal Reserve Board's reevaluation of the Congressional scheme embodied in the Glass-Steagall Act, 12 U.S.C. §§ 24(Seventh), 78, 377-78 (1982 and Supp. V 1987). We held that that Act provided the Federal Reserve Board with adequate authority to allow bank holding-company subsidiaries to deal in certain securities notwithstanding a long-existing, previously unchallenged regulatory prohibition on such dealing. In the instant case, the Secretary has concluded that prior policy failed to implement the statute. *See* 53 Fed. Reg. 2923 ("Upon review of the guidelines, however, the Department for several reasons no longer believes that these [past] approaches were correct."). As noted above, we believe that the language and history of Title X are fully consistent with the regulations challenged in the instant case. Even if less than the customary deference is

accorded the Secretary in light of prior administrative construction, the regulations before us must be upheld.

Turning to the program integrity regulations, appellants contend that the separation requirements of Section 59.9 of the regulations, mandating separate facilities, personnel and records, frustrate the intent of Congress that Title X programs be an integral part of a broader health care system. They argue that such integration is impermissibly burdened because the efficient use of non-Title X funds by Title X grantees will be adversely affected by the regulations. For support, they rely principally on the generalized language in the House Conference Report that "[t]he legislation does not and is not intended to interfere with or limit programs conducted in accordance with State or local laws and regulations which are supported by funds other than those authorized under this legislation." Conf. Rep. No. 1667, 91st Cong., 2d Sess. 6, *reprinted in* 1970 U.S. Code Cong. & Admin. News 5080, 5082. The argument proves too much, however, because it contemplates that non-federal grantors can override specific restrictions embodied in federal legislation.

Moreover, the Secretary could reasonably conclude that a degree of separation beyond arbitrary bookkeeping entries between Title X projects and projects counseling or performing abortions is necessary if Section 1008's restriction is to be given any meaning in practice. Indeed, the new separation requirements are hardly a major departure from past administrative construction. For example, in 1978, the Department of Health and Human Services' predecessor agency acknowledged that "the grantee must insure that [a] Title X-supported program is separate and distinguishable from those other [abortion-related] activities. Separate bookkeeping entries are not enough." Memorandum of Apr. 14, 1978, *supra*, at 5. We believe the new regulations fit comfortably within that policy. Finally, the new regulations, as described earlier, provide flexibility in requiring a case-by-case evaluation of compliance by Title X projects. 53 Fed. Reg. 2940. We thus conclude that the separation requirements are within the Secretary's authority based on a valid construction of the statute. *See State of New York v. Bowen*, 690 F. Supp. at 1267, 1271-72.

We need say little to dispose of appellants' contention that the regulations are arbitrary and capricious, as that test is functionally equivalent to the reasonableness test of *Chevron*, 467 U.S. at 843-45.

2. *Constitutional Issues*

Appellants also argue that the counseling and advocacy regulations are unconstitutional on several grounds. First, they assert that the regulations impermissibly burden a woman's privacy right to an abortion. Second, they contend that the regulations violate the First Amendment. On both points, however, Supreme Court precedent is to the contrary.

With regard to the right of privacy, the Supreme Court has held that government has no constitutional obligation to subsidize an activity merely because the activity is constitutionally protected. *See, e.g., Cammarano v. United States*, 358 U.S. 498, 515 (1959) (Douglas, J., concurring). The Court has specifically held, moreover, that government may validly choose to favor childbirth over abortion and to implement that choice by funding medical services relating to childbirth but not those relating to abortion. In *Maher v. Roe*, 432 U.S. 464 (1977), the Court upheld a statute that provided Medicaid recipients with payments for medical services related to childbirth but denied such payments for nontherapeutic abortions. In doing so, it noted that "[t]here is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." 432 U.S. at 475. It also noted that the constitutional right of privacy recognized in *Roe v. Wade*, 410 U.S. 113 (1973) "implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds." 432 U.S. at 474. In *Harris v. McRae*, 448 U.S. 297 (1980), the Court upheld the constitutionality of the Hyde Amendment, which denies public funds for some medically necessary abortions. The Court explained that that provision "places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy, but rather, by means of unequal subsidization of abor-

tion and other medical services, encourages alternative activity deemed in the public interest." *Id.* at 315.

The Supreme Court had occasion to revisit *Maher* and *McRae* in its recent decision in *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989). In *Webster*, the Court upheld against a variety of constitutional challenges a Missouri statute providing *inter alia* that no public facilities or employees be used to perform abortions and that physicians conduct viability tests prior to performing abortions.

The Court reaffirmed the vitality of the *Maher-McRae* line of cases in its discussion of the Missouri statute's prohibition on the use of public resources for the performance of abortions, quoting its decision in *DeShaney v. Winnebago County Dep't of Social Servs.*, 109 S. Ct. 998 (1989), to explain that "the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." *Webster*, 109 S. Ct. at 3051 (quoting *DeShaney*, 109 U.S. at 1003).

The Court of Appeals in *Webster* had ruled that Missouri's proscription on the use of public facilities or employees in abortion services ran afoul of *Roe v. Wade* because it "prevent[ed] access to a public facility" and therefore "clearly narrow[ed] and in some cases foreclose[d] the availability of abortion to women." *Reproductive Health Service v. Webster*, 851 F.2d 1071, 1081 (8th Cir. 1988). The Supreme Court disagreed, stating that the Court of Appeals' analysis was not materially different from the argument rejected in *Maher* and *McRae*. *Webster*, 109 S. Ct. at 3052. "As in those cases," the Court stated, "the State's decision here to use public facilities and staff to encourage childbirth over abortion 'places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy.' " *Id.* (quoting *McRae*, 448 U.S. at 315). Because the funding restrictions upheld in *McRae* and *Maher* were constitutionally permissible despite their potential limits upon the choices of women seeking abortions, the Court found that "it strains logic" to suggest that a similar restriction on the use of public facilities and employees would be constitutionally infirm, *id.*, and pointed out that "[i]f the State may 'make a

value judgment favoring childbirth over abortion and . . . implement that judgment by the allocation of public funds,' surely it may do so through the allocation of other public resources, such as hospitals and medical staff." *Id.* (citation omitted) (quoting *Maher*, 432 U.S. at 474).

We do not disagree with our dissenting colleague that the regulations in question may hamper or impede women in exercising their right of privacy in seeking abortions. *Webster*, however, emphasized that so long as no affirmative legal obstacle to abortion services is created by a denial of the use of governmental money, facilities, or personnel, the practical effect of such a denial on the availability of such services is constitutionally irrelevant. Certainly, an outright prohibition on the performance of any particular medical procedure in public hospitals or clinics will, if they constitute a substantial portion of such facilities in a local market, make provision of the particular service more expensive and less available. In *Webster*, Missouri denied the provision of abortion services in all public facilities, including hospitals, in order to "encourage childbirth over abortion." 109 S. Ct. at 3052. This seems to us a prohibition substantially greater in impact than the regulations challenged in the instant matter. Since these regulations create no affirmative legal barriers to access to abortion, therefore, *Webster* clearly refutes the privacy claims raised by plaintiffs.[3] For these reasons, we also believe that *Webster* cannot be reconciled with the recent decision of the First Circuit in *Massachusetts v. Secretary of Health and Human Servs.*, No. 88-1279, slip op. at

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3 Title 42 C.F.R. § 59.8(a)(3) (1988) prohibits Title X providers from "excluding available providers who do not provide abortions." This language was not intended to prevent a Title X grantee from excluding a facility that it regards as medically unsound for reasons other than its failure to provide abortions. As the discussion accompanying the regulations makes clear, the language was intended only to prevent "the deliberate exclusion in the composition of the list of providers that do not provide abortions or referrals for abortion." 53 Fed. Reg. at 2938. Title 42 C.F.R. § 59.8(b)(4) prohibits the exclusion of "appropriate providers which do not provide or refer for abortions." The word "appropriate" leaves room for judgments as to the medical worthiness of such providers and the portion of the discussion quoted above applies to (b)(4) as well.

26-40 (1st Cir. May 8, 1989) (holding regulations unconstitutional because they pose an obstacle to abortion), *opinion withdrawn and en banc rehearing granted*, (order of Aug. 9, 1989).

With regard to speech rights,[4] the Secretary's implementation of Congress's decision not to fund abortion counseling, referral or advocacy also does not, under applicable Supreme Court precedent, constitute a facial violation of the First Amendment rights of health care providers or of women. The Court has extended the doctrine that government need not subsidize the exercise of fundamental rights to speech rights. In *Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1983), a nonprofit group, Taxation with Representation ("TWR"), claimed that the prohibition against substantial lobbying by organizations exempt from tax under I.R.C. § 501(c)(3) imposed an "unconstitutional condition" on the receipt of tax-deductible contributions. The Supreme Court, in rejecting this contention, stated:

> The [Internal Revenue] Code does not deny TWR the right to receive deductible contributions to support its nonlobbying activity, nor does it deny TWR any independent benefit on account of its intention to lobby. Congress has merely refused to pay for the lobbying out of public moneys. This Court has never held that Congress must grant a benefit such as TWR claims here to a person who wishes to exercise a constitutional right.

461 U.S. at 545. It again noted that "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right." *Id.* at 549. "The reasoning of these decisions is simple: 'although government may not place obstacles in the path of a [person's] exercise of . . . freedom of [speech],

4 One of the provisions of the Missouri statute at issue in *Webster* prohibited the use of public funds, personnel or facilities for the purpose of "encouraging or counseling" a woman to have an abortion not necessary to save her life, and the *Webster* plaintiffs had attacked that section of the statute on First Amendment grounds in the Court of Appeals. *See Reproductive Health Service v. Webster*, 851 F.2d 1071, 1078 (8th Cir. 1988). Plaintiffs, however, abandoned that claim before the Supreme Court, rendering the question moot, so we do not have the benefit of an explicit decision on the First Amendment issues implicated there.

it need not remove those not of its own creation." *Id.* at 549-50 (quoting *McRae*, 448 U.S. at 316); *see also DKT Memorial Fund v. Agency for Int'l Dev.*, No. 88-5243, slip op. at 23-38 (D.C. Cir. Oct. 10, 1989) (abortion-related restrictions on use of funds by international population planning program upheld as mere refusal to subsidize particular exercise of speech rights).

In addition, appellants argue that the restrictions on the subsidization of speech contained in the regulations are impermissible because the government may not condition receipt of a benefit on the relinquishment of constitutional rights. *See Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *Taxation With Representation*, 461 U.S. at 545. This case is distinguishable from *Perry*, however, because individuals employed by Title X projects remain free to say whatever they wish about abortion outside the Title X project. *See* 42 C.F.R. § 59.10(b)(6), (7) (1988). *Perry*, by contrast, involved a situation in which an individual was penalized precisely for exercising First Amendment rights outside the scope of his employment.

We do not regard the "program integrity" regulations as permitting the Secretary to deny funding to health care providers because they employ personnel who perform or counsel abortions outside their employment by the Title X grantee. *Cf. Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040, 3052 n.8 (1989) ("This case might . . . be different if the State barred doctors who performed abortions in private facilities from the use of public facilities . . . ."). Although "[t]he existence of separate personnel" may be considered under 42 C.F.R. § 59.9(c) (1988) in determining whether Title X facilities are in fact separate from, and independent of, abortion-related facilities, the Secretary must consider numerous other factors, including distinct accounting records, physical separation, and the degree to which signs and other written indicia denote the two as separate facilities. 42 C.F.R. § 59.9 (1988). Thus "[w]here sharing of personnel exists, but the project can demonstrate on an overall basis that it is objectively separated from prohibited activities, the Department will determine that the project is in compliance with § 59.9." 53 Fed. Reg. at 2941. In addition, the regulations do not authorize the Secretary to take

the non-Title X employment activities of personnel into account in determining whether to grant a facility Title X status.

Our dissenting colleague relies upon *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986) and *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983). These cases, however, involved laws that regulated the flow of information from doctors to patients without regard to whether public funds were being used. Given the numerous Supreme Court decisions discussed *supra* that distinguish between direct regulation and conditions on public funding, neither *Thornburgh* nor *City of Akron* control the present action. *See also DKT Memorial Fund*, slip op. at 23-24.

We also note that the decision in *Republican Nat'l Comm. v. Federal Election Comm'n*, 487 F. Supp. 280 (S.D.N.Y. 1980) [hereinafter *RNC*], *certified questions answered*, 616 F.2d 1 (2d Cir. 1980), *aff'd*, 445 U.S. 955 (1980), supports our conclusion. In *RNC*, plaintiffs argued that conditioning the public funding of a presidential campaign on the observance of limits on expenditures, held to be unconstitutional in *Buckley v. Valeo*, 424 U.S. 1 (1976), deprived candidates and their supporters of their First Amendment rights. The three-judge district court held that "[w]hile Congress may not condition benefit on the sacrifice of protected rights, the fact that a statute requires an individual to choose between two methods of exercising the same constitutional right does not render the law invalid, provided the statute does not diminish a protected right." 487 F. Supp. at 284-85 (citations omitted). In the instant case, potential grantees may seek funding from the states or other governmental units or from private sources as well as from the federal government, subject only to the separation requirements described above. In contrast, *RNC* upheld a statutory scheme in which candidates are compelled to select either exclusively public or exclusively private funding. Moreover, under *RNC*, the candidates' choice is further circumscribed because the alternative of private fundraising is subject to stringent limits on the size of permissible contributions. *See* 2 U.S.C. § 441a (1988). Title X does not compel any such one-or-the-other choice and is

not accompanied by statutory constraints on alternative sources of funding.

Finally, we add two qualifications. First, the present action does not pose the issues that might arise if a doctor were to treat private patients in an entity that receives Title X funds. In such a situation, the regulations limiting the role of Title X clinics with regard to abortion might be read to preclude the physician from giving advice concerning abortions to a patient who was in the clinic, not to take advantage of the services it offers as a Title X grantee, but to see her regular doctor. This issue appears to have been raised in *Webster* with regard to physicians in state-supported hospitals but mooted before the Supreme Court decision. *See supra* note 4; *Reproductive Health Services v. Webster*, 662 F. Supp. 407, 427-28 (W.D. Mo. 1987). Whether this issue arises in the context of Title X clinics is not clear on the present record, and we do not reach it.

Second, we note that the regulations in question do not facially discriminate on the basis of the viewpoint of the speech involved. The regulations require that requests for information on abortion be answered by the factual statement that the particular program does not include it as a family planning method and that only pre-natal services other than abortion are offered. Argumentation pro or con as to the advisability of an abortion for a particular woman is neither required nor authorized. The woman is thus under no pressure as a result of the regulations to accept or reject the services offered. Nor do the regulations in any way suggest that Title X funds may be used for public anti-abortion advocacy. Should the actual effect of the regulations be otherwise, the issues raised thereby can be resolved on a proper record.[5]

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5 For these reasons, we again disagree with the decision in *Massachusetts v. Secretary of Health and Human Servs.*, No. 88-1279, slip op. at 41-43 (1st Cir. May 8, 1989) (holding that regulations violate First Amendment), *opinion withdrawn and en banc rehearing granted*, (order of Aug. 9, 1989).

CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.

CARDAMONE, *Circuit Judge*, concurring:

I concur in Judge Winter's thorough opinion to affirm because I agree that the regulations promulgated by the Secretary are permissible under Title X, and are not constitutionally infirm. If experience under the regulations proves otherwise, a challenge may later be raised and resolved. I write separately to express two concerns.

The first concern is directed at the regulation requiring the Secretary to consider "[t]he existence of separate personnel" as a factor in determining the "objective integrity and independence [from abortion-related facilities]" of Title X facilities. *See* 42 C.F.R. § 59.9(c) (1988). This factor allows the Secretary in allocating Title X funding to consider whether Title X health-care providers perform or counsel abortions outside of their employment. The concern this raises is whether the Secretary may withhold funding from health-care providers based upon their exercise of First Amendment rights outside the scope of their Title X employment; a course of action explicitly found unconstitutional in *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *see also Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040, 3052 n.8 (1989) ("This case might . . . be different if the State barred doctors who performed abortions in private facilities from the use of public facilities . . . .").

Despite my concerns under *Perry*, I do not believe § 59.9(c) is constitutionally unsound. The regulation's plain language indicates that the Secretary will consider the existence of separate personnel in conjunction with several other factors: the maintenance of distinct accounting records, the physical separation of facilities, and the degree to which signs and other written indicia denote the two as separate facilities. Thus, "[w]here sharing of personnel exists, but the project can demonstrate on an overall basis that it is objectively separated from prohibited activities, the Department will determine that the project is in compliance . . . ." 53 Fed. Reg. 2922, 2941 (1988). In addition, there is no evidence in the record before us that the Secretary has relied or intends to rely upon the non-Title X employment activities of personnel in determining whether to grant a facility Title X status.

The second concern relates to the regulations insofar as they do not permit Title X attending physicians to provide the Yellow Pages found in an ordinary telephone book to a patient requesting information about health-care providers who perform and counsel patients regarding abortions. The Secretary's oral and written interpretations of the regulations state that Title X grantees may "keep[ ]" but not "provi[de]" the Yellow Pages. *See* 53 Fed. Reg. 2922, 2942 (1988). In addition, the plain language of § 59.8(a)(3) prohibits the inclusion of "health care providers whose principal business is the provision of abortions" in referral lists given to patients. Because such facilities are listed in the Yellow Pages, this regulation bars their use as a reference source for Title X patients.

Under the regulations, a Title X physician's hands are tied with respect to the response he or she may give to a patient seeking abortion information. Crafting the regulations in this fashion constitutes a trap for the mostly unsophisticated and unwary patients,[1] and jeopardizes the ability of Title X physicians to safeguard the health of those seeking their expert advice. For example, a Title X grantee *must* refer patients to facilities that do not perform or counsel abortions, *see* 42 C.F.R. § 59.8(a)(3) & (b)(4) (1988), regardless of whether the grantee believes the facility is sound medically or not. Moreover, the list must include *all* such facilities because the Secretary has ruled that excluding *any* such provider is inappropriate

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1 It has been said that Title X, as the single largest federally-funded family planning program, serves 4.3 million people: its targeted population consists of an estimated 14.5 million women at risk of unintended pregnancy, including 5 million adolescents between the ages of 15 and 19, and 9.5 million adult women between the ages of 20 and 44, all of whom have an income 150 percent below the poverty level. Note, *The Title X Family Planning Gag Rule: Can the Government Buy Up Constitutional Rights?*, 41 Stan. L. Rev. 401, 408 (1989).

under Title X. The dilemma that comes to mind occurs when the Title X grantee knows that a health-care provider that does not perform or counsel abortions is—in the physician's opinion—not medically of high quality, but must nonetheless list that facility as a proper reference to a patient seeking the grantee's advice.

When faced with a somewhat analogous predicament, the Supreme Court, addressing the issue of what information must be supplied by a physician to facilitate a patient's "informed consent," declined to define the information provided by the physician narrowly. Rather the Court required only that the physician indicate "what would be done and . . . its consequences" because a more detailed definition "might well confine the attending physician in an undesired and uncomfortable straitjacket in the practice of his profession." *Planned Parenthood v. Danforth*, 428 U.S. 52, 67 n.8 (1976).

It strikes me that a regulation allowing the Yellow Pages to be "kept" but not "provided" is a small and petty contrivance, inconsistent with our nation's high principles. Hence, although I vote to affirm because the subject regulations meet the letter of the law, I must say that in my view they fall woefully short of the tolerant spirit that gave birth to and should continue to animate our constitutional system.

KEARSE, *Circuit Judge*, dissenting in part:

I respectfully dissent from so much of the judgment as upholds the new regulations promulgated by the Secretary of Health and Human Services with respect to abortion counseling and referrals. Even assuming that the Secretary's new interpretation of Title X, 42 U.S.C. §§ 300 et seq. (1982 & Supp. V 1987), is entitled to deference, I view these regulations as arbitrary and capricious and as violative of rights guaranteed by the Constitution.

Section 59.8(a)(1) of the new regulations, *see* 42 C.F.R. §§ 59.7-59.10 (1988), entitled in part "Prohibition on counseling and referral for abortion services," provides that a "Title X project may not provide counseling concerning the use of abor-

tion . . . or provide referral for abortion." There can be no doubt that the Secretary intends this regulation to forbid a grantee from informing a pregnant woman of the availability of abortion and even from telling her where she can get abortion-related information. For example, though the regulations permit a grantee to give the woman a list of prenatal-care service providers that might also offer abortions, the list must comply with several requirements. It *must* include any available prenatal-care providers that *do not* perform abortions; it *cannot* include providers that offer abortions as their "principal business"; and it cannot "weigh[ ]" in favor of abortion providers. 42 C.F.R. § 59.8(a)(3). The grantee is not allowed to inform the woman which providers on the list, in addition to offering prenatal care, also perform abortions. Rather, care providers that also perform abortions may be included only if "*the referral* is *specifically* made to the providers of *prenatal* care services." 53 Fed. Reg. 2922, 2938 (1988) (emphasis added). Indeed, the grantee is required to inform the client about care to preserve the unborn fetus. Section 59.8(a)(2), for example, provides that "once a client served by a Title X project is diagnosed as pregnant, she must be referred for appropriate prenatal and/or social services *by furnishing a list of available providers that promote the welfare of mother and unborn child.*" (Emphasis added.)

The majority states that the regulations "do not facially discriminate on the basis of viewpoint of the speech involved," that they do not authorize argumentation "pro or con" as to the advisability of abortion, and that they do not suggest "in any way" that Title X funds may be used for advocacy against abortion. I submit that precisely the opposite is plain from the face of the regulations. In addition to the regulations discussed above, for example, § 59.8(b)(4) provides that when a woman asks for a list of abortion providers, the grantee is not permitted to give her a list that includes entities whose principal business is abortion, or a list that does not include "providers of prenatal care in the area which *do not* provide or refer for abortions." (Emphasis added.) In contrast, § 59.8(b)(5) provides that when a woman asks for information on abortion, the grantee is permitted to "tell[ ] her that the project does not consider abortion

an appropriate method of family planning and therefore does not counsel or refer for abortion"; it is permitted to "tell[ ] the client that the project can help her to obtain prenatal care and necessary social services, and provide[ ] her with a list of such providers from which the client may choose."

Thus, the express prescriptions and proscriptions in the regulations require the grantee to emphasize prenatal care and prohibit it from identifying any entity as a provider of abortions. Plainly, the regulations facially discriminate on the basis of viewpoint and control the content of the grantee's permitted speech.

In *Regan v. Taxation With Representation*, 461 U.S. 540 (1983), the Supreme Court warned that the government may not, consistent with First Amendment constraints, manipulate subsidy programs in a way " 'ai[med] at the suppression of . . . ideas' " it considers undesirable. *Id.* at 548 (quoting *Cammarano v. United States*, 358 U.S. 498, 513 (1959)). In my view, just such an impermissible manipulation has occurred here.

This content restriction is all the more pernicious because it deprives a woman of her constitutionally protected right, recognized in *Roe v. Wade*, 410 U.S. 113 (1973), to choose whether or not she will have an abortion. The regulations at issue here prohibit the physician in a Title X facility from communicating to his patient frank and complete advice if it involves consideration of abortion. They require him, in referring his patient to other health-care providers, to identify only prenatal-care facilities. If his pregnant patient raises the subject of abortion, he is required to tell her that he cannot give her any advice or counseling on the subject. If she asks where she can get information, the regulations prohibit even an informative response.

Though the majority seems to believe that it is sufficient that the grantee is allowed to keep the "yellow pages" in its offices, a telephone book seems a poor substitute for the advice of one's doctor. Further, the Secretary's interpretations of the regulations, both written and oral, reveal that the Title X grantee is not even allowed to refer the woman to the yellow pages. Thus, the written interpretation of the regulations says merely that the grantee may "keep[ ]" the yellow pages, while in the same sentence referring to *other* information that may be "provi[ded]."

53 Fed. Reg. 2922, 2942 (1988). There is no indication in the written interpretation that the yellow pages may be "provided," and at oral argument of this appeal, the Secretary stated that they could not.

By damming the flow of information from physician to patient, the Secretary's regulations impermissibly impede a woman's exercise of her constitutional privacy right. Time and again, the Supreme Court has emphasized that governmental regulation violates a woman's right to choose between childbirth and abortion when it interferes with the information and advice she may be given by her physician. In *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983) ("*Akron*"), the Court stated that "a pregnant woman must be permitted, in consultation with her physician, to decide to have an abortion and to effectuate that decision 'free of interference by the State.' " *Id.* at 429-30 (quoting *Roe v. Wade*, 410 U.S. at 163). In *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986) ("*Thornburgh*"), the Court disapproved a requirement that a physician provide a woman with a list of agencies offering alternatives to abortion, finding it to be "nothing less than an outright attempt to wedge the [state]'s message discouraging abortion into the privacy of the informed-consent dialogue between the woman and her physician." *Id.* at 762.

Unlike the regulatory schemes in such cases as *Harris v. McRae*, 448 U.S. 297 (1980), and *Maher v. Roe*, 432 U.S. 464 (1977), in which the regulating authority was found merely to have refused to extend an affirmative benefit to women who freely chose abortion, but not to have placed obstacles in the way of an informed choice, the Secretary's regulations here plainly interfere with the pregnant woman's freedom to decide which course of action she prefers. In some cases, the information ban will delay the appropriate education of the patient to such an extent that she is denied any genuine choice. In some cases, the patient will never be fully informed, for as the Secretary has acknowledged, "[f]or many clients, family planning programs are their only continuing source of health information and medical care." U.S. Dep't of Health and Human Services, *Program Guidelines for Project Grants for Family*

Planning Services § 9.4 (1981). These regulations prevent such a program from giving the client any substantive information regarding abortion as an option; if she asks where she may obtain such information, her Title X physician is prohibited from telling her.

By prohibiting the delivery of abortion information and prohibiting communication even as to where such information can be obtained, the present regulations deny a woman her constitutionally protected right to choose. She cannot make an informed choice between two options when she cannot obtain information as to one of them.

In sum, I would rule that just as a "State may not require the delivery of information designed 'to influence the woman's informed choice between abortion or childbirth,' " *Thornburgh*, 476 U.S. at 760 (quoting *Akron*, 462 U.S. at 444), the government may not forbid the delivery of certain information in order to promote an uninformed choice.

I would also rule that the new regulations on counseling and referral are arbitrary and capricious. Certainly the proscription of § 1008, *i.e.*, that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning," 42 U.S.C. § 300a-6, does not on its face require a ban on the communication of information or on grantees' directing a pregnant woman to a non-Title X entity from which she can obtain information and counseling on abortion. The Secretary's prior interpretation was that "the provision of information concerning abortion services [and] mere referral of an individual to another provider of services for an abortion . . . are not considered to be proscribed by § 1008."

Nor has practice suggested that the Secretary's about-face was needed for enforcement purposes. Regulations embodying the prior interpretation were in effect for some 17 years, and the Secretary cites no abuse of the prior regulatory scheme. Indeed, a 1982 report of the U.S. General Accounting Office, following review of grantee compliance with the strictures of Title X and the regulations thereunder, found "no evidence that title X funds had been used for abortions or to advise clients to have abortions," and "no indications that any women were . . . encouraged to have abortions." Rather, at oral argument of

this case in the district court, the Secretary admitted that his new regulations were the result of a shift in the political climate. Thus, he stated that

> it is certainly true that one of the prime reasons for these regs is a stricter enforcement of the separation of abortion as family planning from Title X programs. That is a matter of policy. It is a matter of politics.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 88-6204/06

THE STATE OF NEW YORK, THE CITY OF NEW YORK, THE NEW YORK CITY HEALTH & HOSPITALS CORP., DR. IRVING RUST, on behalf of himself, his patients, and all others similarly situated, DR. MELVIN PADAWER, on behalf of himself, his patients, and all others similarly situated, MEDICAL AND HEALTH RESEARCH ASSOCIATION OF NEW YORK CITY, INC., PLANNED PARENTHOOD OF NEW YORK CITY, INC., PLANNED PARENTHOOD OF WESTCHESTER/ROCKLAND, and HEALTH SERVICES OF HUDSON COUNTY, NEW JERSEY,

Plaintiffs-Appellants,

—against—

DR. LOUIS SULLIVAN, or his successor, Secretary of the United States Department of Health and Human Services,

Defendant-Appellee.

ORDER

Plaintiffs-appellants having come before this court on a Motion for an Injunction and Stay Pending Review on Writ of Certiorari pursuant to Fed. R. App. P. 41(b) and the arguments of both parties having been duly considered and upon good cause shown, it is on this 21st day of November, 1989,

ORDERED that defendant-appellee Sullivan, his successors and assigns, be enjoined from enforcing or relying upon the regulations codified at 42 C.F.R. §§ 59.2, 59.5, 59.7, 59.8, 59.9, 59.10 (1988) in any manner as to plaintiffs-appellants herein, pending review of this case by the United States Supreme Court on writ of certiorari; and it is

FURTHER ORDERED that the mandate of this court in *New York v. Sullivan*, Nos. 88-6204/06 (2d Cir. Nov. 1, 1989), be stayed pending final resolution of this case by the United States Supreme Court.

Dated: 11/21/89 Signed: /s/ AMALYA L. KEARSE
per RKW

/s/ RICHARD J. CARDAMONE
per RKW

/s/ RALPH WINTER

S. Rep. No. 1004, 91st Cong., 2d Sess., *reprinted in* 116 Cong. Rec. 24095-96 (1970)

. . . .

The committee does not view family planning as merely a euphemism for birth control. It is properly a part of comprehensive health care and should consist of much more than the dispensation of contraceptive devices . . . . [A] successful family planning program must contain the following components:

(1) Medical services, including consultation, examination, prescription, and continuing supervision, supplies, instruction, and referral to other medical services as needed.

. . . .

H.R. Conf. Rep. No. 1667, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Admin. News 5081-82

. . . .

. . . .

It is, and has been, the intent of both Houses that the funds authorized under this legislation be used only to support preventive family planning services, population research, infertility services, and other related medical, informational, and educational activities. The conferees have adopted the language contained in section 1008, which prohibits the use of such funds for abortion, in order to make clear this intent. The legislation does not and is not intended to interfere with or limit programs conducted in accordance with State or local laws and regulations which are supported by funds other than those authorized under this legislation.

. . . .

Public Health Service Act § 1001, 42 U.S.C.A. § 300 (West 1982)

Historical Note

. . . .

"It is the purpose of this Act . . . .

"(1) to assist in making comprehensive voluntary family planning services readily available to all persons desiring such services;

. . . .

"(4) to enable public and nonprofit private entities to plan and develop comprehensive programs of family planning services;

"(5) to develop and make readily available information (including educational materials) on family planning and population growth to all persons desiring such information;

. . . .

United States Department of Health and Human Services, *Program Guidelines For Project Grants For Family Planning Services* (1981)

. . . .

8.6 PREGNANCY DIAGNOSIS AND COUNSELING

Grantees must provide pregnancy diagnosis and counseling to all clients in need of this service. Pregnancy testing is one of the most frequent reasons for an initial visit to the family planning facility, particularly by adolescents. It is therefore important to use this occasion as an entry point for providing education and counseling about family planning.

. . . .

Pregnant women should be offered information and counseling regarding their pregnancies. Those requesting information on options for the management of an unintended pregnancy are to be given non-directive counseling on the following alternative courses of action, and referral upon request:

—Prenatal care and delivery
—Infant care, foster care, or adoption
—Pregnancy termination

. . . .

United States Department of Health, Education, and Welfare, *Program Guidelines For Project Grants For Family Planning Services* (Jan. 1976)

. . . .

Patients [who become pregnant with the IUD in place] should be advised as follows:

. . . .

(3) If the IUD is not removed, the patient should know there is an increased risk of infected abortion occurring when pregnancy is allowed to continue. The patient and her physician should discuss whether it is best to terminate or continue the pregnancy.

. . . .

The following should be covered during the interview [following the physical examination and the selection of a family planning method]:

. . . .

(h) Give pregnancy counseling, when appropriate.

. . . .

(j) Make appropriate referrals for any needed services not furnished through the facility. (Such referrals should be followed-up by the project.)

. . . .

***Amicus* Brief of the Secretary of Health and Human Services, *Valley Family Planning v. North Dakota*, 661 F.2d 99 (8th Cir. 1981) (No. 80-1471)**

Attachment A: Memorandum from Department of Health, Education, and Welfare (July 25, 1979)

. . . .

Hence, while § 59.5(d) does not require a project to make referrals to abortion providers in *all* cases, a project could not - consistent with § 59.5(d) - refuse as a matter of policy to make such referrals in *any* case, regardless of the medical indications therefor.

. . . [A] project *may*, consistent with § 1008, make "mere referrals" for abortion, as long as it does not then go on to promote or encourage use of the procedure for family planning purposes. We see no reason why requiring the making of such referrals under the limited circumstances described above should change this result. Indeed, we think that where such a referral is necessary because of medical indications, abortion is not being considered as a method of family planning at all, but rather as a medical treatment possibly required by the patient's condition. . . .

. . . .

Attachment B: Memorandum From Office of the General Counsel, Department of Health, Education and Welfare (Apr. 14, 1978)

. . . .

[T]he provision of information concerning abortion services, mere referral of an individual to another provider of services for an abortion, and the collection of statistical data and information regarding abortion are not considered to be proscribed by § 1008. [Footnotes omitted.]

. . . .

National Center for Family Planning Services, Health Services and Mental Health Administration, Department of Health, Education, and Welfare, *A Five-Year Plan for the Delivery of Family Planning Services* (Oct. 1971)

. . . .

Within the context of family planning service programs, abortions are not viewed as a method of fertility control, but as a service that should be available in accordance with local laws only in the event of a human or contraceptive method failure.

. . . Abortion would then serve as a backup measure for contraceptive failure, thereby still further assuring the freedom of choice of those who do not desire an unwanted birth.

. . . .

Memorandum from Joel M. Mangel, Deputy Assistant General Counsel, to Louis M. Hellman, M.D., Deputy Assistant Secretary for Population Affairs (Apr. 20, 1971) (re: § 1008 of the Public Health Service Act)

. . . .

We do not believe that the word "program," as used in section 1008, was intended to be so comprehensive as to include any and all family planning activities carried on by an applicant for Title X funds. For example, we do not believe that a hospital offering abortions for family planning purposes, consonant with State law, would be disqualified from receiving Title X funds for the operation of a separate family planning program which utilized only preventive family planning methods.

. . . .

Letter from Louis M. Hellman, M.D., Deputy Assistant Secretary for Population Affairs, to Hilary H. Connor, M.D., Regional Health Administrator (Nov. 19, 1976) (discussing current policies regarding use of Title V and Title X funds for counseling and payment of abortions)

. . . .

[I]f you are funded under Title X, you cannot promote or encourage abortion. In other words, you should not employ directive counseling in relation to abortions. A counselor working under the aegis of a physician, however, has not only a First Amendment right but duty to inform a patient of all legal options. The right to make referrals comes under the First and Fourteenth Amendments as well as the Code of Ethics of the American Medical Association.

. . . .

Memorandum from Louis Belmonte, Regional Program Consultant, Family Planning (May 25, 1979) (clarifying grantees' family planning program activities with respect to § 1008 of Title X)

. . . .

The provision of information on abortion services and the mere referral of a patient to another provider for such a procedure are permissible.

. . . .

DR. MELITA GESCHE

Director of the Bureau of Reproductive Health of the New York State Department of Health ("NYSDOH")
November 10, 1987

. . . .

4. The NYSDOH, through its Bureau of Reproductive Health, is one of two Title X grantees in New York State. The other is the Medical Health and Research Association of New York City, Inc. ("MHRA"). As a grantee, the NYSDOH administers the yearly Title X family planning services project grant it receives from the United States Department of Health and Human Services ("HHS"). . . .

5. . . . The NYSDOH Title X project grant funds 37 delegate agencies throughout New York State. . . .

6. Nearly 200,000 women were served by Title X subsidized family planning delegate agencies in 1986. . . .

. . . .

15. Further, the regulations would bar the Title X agency from providing the pregnant patient with complete and comprehensive information regarding the full range of options available to her. The Title X subsidized agency would not be able to

refer or counsel the patient regarding all her options nor provide the patient with descriptive information to aid her in making a decision. Instead of providing the patient with appropriate or necessary counseling, the Title X subsidized agency would be restricted to handing the patient a list of names weighted in favor of health care providers who provide prenatal care. This again patently violates all tenets of sound and ethical, medical practice, which, as codified in the State's public health law on informed consent, require health professionals to disclose to patients all risks, benefits and alternatives to a particular mode of treatment. Public Health Law § 2805-d.

. . . .

18. The separation requirements contained in 42 C.F.R. § 59.9 threaten the continued viability of many of the Title X subsidized agencies in New York because of the administrative costs, increased costs for property and property insurance, increased costs of personnel and the like. Most hard hit will be rural areas, in which the Title X subsidized clinics serve large areas and where duplication of services would be financially and administratively unfeasible. Consequently, the regulations jeopardize the availability of family planning services to women in New York State, particularly in its rural areas.

. . . .

21. Implementation of the regulations would further drain the limited resources of the state, which already largely fund the family planning programs in New York State. Because the regulations conflict with state law and with well settled standards of professional conduct[,] see paragraph 15, *ante*, agencies would be forced to choose between State and Title X funding. . . . Even if the state law provisions explained in paragraph 15 could be ignored and agencies could receive both federal and state funding, the regulations would still increase costs of the state. For example, the regulations' separation requirements would prove so financially and administratively burdensome for many Title X recipients that they may choose either not to comply with those requirements or to provide only restricted services under Title X. Either choice will impose a financial burden on

the state which may have to replace either the abandoned money or service.

. . . .

LINDA RANDOLPH, M.D., M.P.H.

Director of the Office of Public Health of the New York State Department of Health ("NYSDOH")
November 13, 1989

. . . .

3. Complying with the regulations would run counter to NYSDOH's standards of acceptable medical practice by effectively denying low- and moderate-income women information they need to make informed decisions about their reproductive health care. Carrying out the requirements of 42 CFR 59.8-59.10 would violate New York State's policy that medical service "of the highest quality, efficiently provided and properly utilized at a reasonable cost, are of vital concern to the public health." *See* N.Y.S. Public Health Law § 2800. Implementation of the regulations at issue would force medical professionals to violate state codes of professional conduct; *see* N.Y.S. Education Law §§ 6506-6509, 8 NYCRR 29.2; and render them liable for malpractice for failing to give full informed consent. *See* N.Y.S. Public Health Law § 2805-d(1).

. . . .

STEPHEN C. JOSEPH, M.D.

Commissioner of Health for the City of New York and a member of the Board of Directors of the New York City Health & Hospitals Corporation
March 4, 1988

. . . .

5. Title X clinics are sources of both health care services and information. In fact, they are the sole source of non-emergency health care for many low income women. . . .

. . . .

9. Under the new regulations, the Title X clinic can no longer explain to a patient that her medical condition (for example, AIDS) or some other factor (for example, exposure to rubella) may have seriously damaged her fetus. The clinic can only refer her to another provider, on the assumption and in the hope that the next provider will counsel her appropriately. In the meantime, the patient will remain ignorant of the information she needs—as soon as possible—to determine whether she wants to risk delivering a severely damaged baby. By the time she gets this information, it may be too late for a first trimester, or for any, abortion.

. . . .

GEORGE W. MORLEY, M.D.

President of the American College of Obstetricians and Gynecologists ("ACOG")
February 1, 1988

. . . .

6. Every year, some 3,900 Title X clinics provide family planning services to nearly 4.5 million patients, many of whom are low income women or adolescents with high risk pregnancies and few of the financial or personal resources necessary to obtain private medical care. . . .

. . . .

12. The prohibition on counseling and referral for abortion may . . . delay women in obtaining abortion services until later and more hazardous stages of pregnancy. Abortions performed later in pregnancy carry increased morbidity and mortality risks. Although only a small percentage of abortions are performed during the second trimester of pregnancy, these abortions caused approximately half of all abortion-related deaths between 1972 and 1981. Moreover, the mortality risk for abortion increases 50 percent with each week after the eighth week of pregnancy while the risk of major complications (morbidity) increases about 30 percent per week. Delay in obtaining abortion services is thus particularly harmful for pregnant adolescents, who already tend to seek medical services belatedly.

13. The requirement that pregnant patients be referred only to prenatal or delivery services will further delay women seeking abortions. Some of these women may be unable to locate a licensed provider in a timely fashion. . . .

14. The prohibition on counseling regarding abortion undermines the very informed consent process for which physicians are responsible. Patients will be deprived of information necessary to make family planning and other health care choices.

. . . .

18. The regulations also will irreparably harm Title X-funded health professionals by causing them to violate the standards of conduct and ethics promulgated by ACOG and other professional organizations. Restrictions on the content of physician-patient counseling are contrary to the ethical practice of medicine and violate a basic medical principle: the duty of the health care provider to supply all pertinent information to the patient.

19. . . . ACOG *Standards for Obstetric-Gynecologic Services* (1985) . . . state:

> In the event of an unwanted pregnancy, the physician should counsel the patient about her options of continuing the pregnancy to term and keeping the infant, continuing the pregnancy to term and offering the infant for legal adoption, or aborting the pregnancy

and ACOG *Statement of Policy* (Dec. 1977) . . . states:

> Counseling directed solely toward either promoting or preventing abortion does not sufficiently reflect the full nature of the problem or the range of options to which the patient is entitled. Appropriately balanced counseling, combined with the available and accessible facilities, provides the *minimum* base for the opportunity to make a truly informed choice. (Emphasis added).

. . . .

21. Restrictions on a physician's ability to provide information to patients also raises the spectre of medical malpractice. Physicians may be liable for failure to fully inform patients of all alternative options, failure to provide adequate information regarding health risks, and failure to provide appropriate follow-up services. . . .

. . . .

JAMES H. SAMMONS, M.D.

Physician and the Executive Vice President of the American Medical Association ("AMA")
February 18, 1989

. . . .

3. [T]he AMA believes that physicians must be free to disclose to their patients the full spectrum of information and options necessary for informed medical decision making. The "Principles of Medical Ethics" promulgated by the AMA, as

elaborated upon in the *Current Opinions of the Council on Ethical and Judicial Affairs of the American Medical Association* (1986) specifically acknowledge that:

> The patient's right of self-decision can be effectively exercised only if the patient possesses enough information to enable an intelligent choice. The patient should make his own determination on treatment. The physician's obligation is to present the medical facts accurately to the patient or to the individual responsible for his care and to make recommendations for management in accordance with good medical practice. The physician has an ethical obligation to help the patient make choices from among the therapeutic alternatives consistent with good medical practice.

Opinion 8.07. Thus, every physician has an ethical and professional *duty* to provide a patient with enough information so that she can make an informed decision as to her medical care.

4. In the opinion of the AMA, the regulations at issue in this case will interfere with the ability of those physicians who happen to be in Title X-funded programs to exercise their best judgment in the manner most responsive to and appropriate for the individual patient's health needs. They will prevent a frank discussion of medical information and artificially constrict the physician-patient dialogue in ways that are inconsistent with sound medical care.

. . . .

8. . . . [T]he AMA is deeply concerned that these regulations will endanger the lives and health of women with medical conditions which may be exacerbated by pregnancy. Under the new regulations, a woman with a condition such as AIDS, diabetes, hypertension, heart disease, renal disease, sickle cell anemia, or cancer will be deprived of necessary counseling and information—*e.g.*, that she faces serious health risks as a result of her pregnancy. Professional standards of care require, however, that physicians be free to apprise these women of the seriousness of their condition, and the potential threat to their lives and health. . . .

. . . .

16. [T]he AMA is deeply concerned that the new regulations seek to legislate medical practice for physicians in Title X-funded programs irrespective of sound medical practice, the physician's best clinical judgment, and the patient's medical needs and wishes. These regulations will force physicians to give their patients medically incomplete and potentially misleading information and referrals. They will compel them to encourage childbirth for all pregnant patients without regard to their critical medical needs and without counseling or discussion about their individual situations. They will denigrate the integrity of the physician-patient relationship. They will force physicians to violate established standards of medical care and professional ethics, and often their own conscience.

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STANLEY K. HENSHAW, Ph.D.

Deputy Director of Research
for the Alan Guttmacher Institute ("AGI") in New York City
March 3, 1988

. . . .

3. In my expert opinion, this regulation will effectively exclude the abortion providers to whom most poor women turn and can afford. Abortions performed in hospitals are generally prohibitively expensive for poor women.

4. [T]he overwhelming majority of abortions are obtained from hospitals or from providers who must be excluded from the referral list. As stated in my earlier affidavit, 70% of all abortions in this country are performed at clinics which would likely have to be excluded from the referral list. In New York State, only 26.5% of the abortions obtained in 1985 were obtained from non-hospital providers who could appear on the required referral list.

5. In addition, because of the maldistribution of abortion providers in New York, any restriction on referrals to licensed abortion providers creates an obstacle to a woman's exercise of

choice. Out of the State's 62 counties, 16 have no providers of abortion that are documented; in 21 counties, the only available providers of abortion services are hospitals.

. . . .

ALLAN ROSENFIELD, M.D.

Professor of Obstetrics-Gynecology and Public Health
and Head of the Division of Population and Family Health
of the Columbia University School of Public Health
February 4, 1988

. . . .

22. . . . The[ ] effect [of the regulations] on the provision of family planning services is no different than a cancer treatment center which favors chemotherapy and radiation over surgery and which thus refuses to give affected individuals information about surgical treatment options and requires staff physicians to give *every* cancer patient counseling about the preferred treatment.

. . . .

JAY KATZ, M.D.

Faculty, Yale Law School
Expert on Informed Consent
March, 1988

. . . .

6. . . . [T]hese regulations do violence to the most basic principles governing the doctor-patient relationship. They compel a doctor to deceive his patient by keeping available options from her and by preventing her from seeking medical services which heretofore have been her right. . . . When a physician conceals options from a patient he abandons her to irreversible

life consequences which she might not have chosen. Abandonment is one of the most heinous violations of the law of malpractice and of medical ethics.

7. The doctor-patient relationship is based on trust. *See* P. Parsons, *The Social System*, (1951); it is recognized by law as a fiduciary relationship. Because patients must be able to rely on their physicians to act in good faith and in their best interest, principles of law and ethics require them to do so.

8. The physician . . . has an obligation to be truthful, to respect the rights of the patient, and to disclose to the patient all pertinent facts regarding the patient's condition and treatment options including the risks and benefits of each. *See Natanson v. Kline*, 350 P.2d 1093, 1102-03 (Kan. 1960).

. . . .

10. . . . [A]lthough a Title X physician may not actually provide abortion or long-term prenatal services, the physician remains obligated to provide the patient with sufficient information to permit a patient to obtain timely, appropriate services elsewhere.

11. In 1978, the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research (the "Commission") was established by statute and charged with the task of examining the ethical and legal aspects of informed consent in the doctor-patient relationship. *See* 42 U.S.C. § 300v *et seq*. The Commission's report, *Making Health Care Decisions: A Report on the Ethical and Legal Implications of Informed Consent in the Patient-Practitioner Relationship*, . . . was released in 1982. . . . The Commission concluded that "a physician is obliged to mention all alternative treatments, *including those he or she does not provide or favor*, so long as they are supported by respectable medical opinion." *Id.* at 76 (emphasis added).

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RAYMOND FINK

Chairperson of the Medical and Health Research Association of New York City, Inc. ("MHRA")
November 9, 1989

. . . .

7. Title X funds allocated to MHRA/MIC-FPP are used to support the provision of family planning services at its Tremont Clinic in the Bronx. During 1988, the Tremont Clinic alone provided over 3,800 visits with Title X dollars. The vast majority of the patients are Black or Hispanic; over 90% have incomes below 150% of the federal poverty level; and 60% are adolescents.

. . . .

10. . . . No other providers in the community are currently in a position to offer comparable services. . . . Because family planning clinics are the only source of health care for many low-income women, many of the patients previously served would never reenter the health care system.

. . . .

13. . . . MHRA simply cannot afford, within the limits of its budget, the duplicative administrative, supervisory, and overhead costs that would be required to permit counseling about abortion with non-Title X funds to continue at a location physically separate from the Title X project site. Because MHRA would be unable to comply with the separation requirement, it is faced with an untenable choice: to forego Title X funds which subsidize the care provided to thousands of low-income women or to cease providing necessary information to patients subsidized by non-Title X sources. . . .

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JOAN COOMBS

Executive Vice President of Planned Parenthood of New York City, Inc. ("PPNYC")
November 10, 1989

. . . .

11. The HUB [Planned Parenthood's center in the South Bronx] provided family planning services for 6,274 low-income women and teenagers in 1988. Of these, 2,317 were under 20 years of age. . . . The HUB is a trusted community resource, not only for health services but for educational programs and teen pregnancy programs as well. Even if there were other services to which these families, women, and teens could turn, there is no doubt that many would be lost in the transition. And, in the South Bronx, adequate alternatives simply do not exist.

. . . .

TONI MORGAN, M.S.W.

Director of Social Services for the Bronx clinic (colloquially called the "HUB") of Planned Parenthood of New York City
December 22, 1987

. . . .

6. Adolescents frequently rely on clinic staff as the *only* available source of family planning information. . . .

. . . .

8. Timely, non-directive counseling which addresses the *whole* adolescent is a necessary part of any family planning program. In fact, when an adolescent is in need of counseling and this need is not met promptly, the consequences may be as serious as repeated pregnancies, running away from home, failure in school or even suicide. Referral alone will often result in severe harm to the adolescent who, having timidly and tentatively reached out for help in a crisis, must be rejected and told to go elsewhere. Faced with such a referral, many of my clients would never obtain help; others would act out in destructive and frequently irrevocable ways.

. . . .

STEPHEN WHITE

Director of Planned Parenthood of Dutchess-Ulster ("PPDU")
December 16, 1987

. . . .

13. The regulations require us to promote childbearing and make the subject of abortion off-limits, irrespective of the patient's emotional or medical condition. Without information, many women will be unaware of their choices. Many women don't know that abortion is a safe and legal alternative to an unintended or unwanted pregnancy. Many won't know that obtaining an abortion after the first trimester is associated with greater health risks. Others won't know of the risks to their health if they continue their pregnancies. And others will travel to distant abortion providers instead of providers nearer to PPDU.

. . . .

15. . . . Many patients will therefore have no source of medical care and conditions we detect will remain untreated. In addition, many patients, particularly teens have no other source of confidential and responsible information.

. . . .

HIROKO T. FELTON, M.D.

Director of the Family Planning Project at Harlem Hospital in New York City
December 29, 1987

. . . .

13. It would be extremely difficult for Harlem [Hospital] to comply with the new Title X regulations and still provide quality medical services in accordance with community standards and New York State law. The new regulations would irreparably harm our program and our patients in the following ways:

a. Options counseling would be curtailed, since any responsible testing and options counseling session must include a discussion of abortion, particularly for patients who express the desire to terminate pregnancy. Patients for whom abortion is medically necessary could, if denied information on the option of abortion, suffer irreparable physical and mental harm.

b. . . . When a counselor is prohibited from answering pregnant and non-pregnant patients' legitimate questions about abortion, the relationship between the two may be irreparably damaged, and the patient may seek answers from less reliable sources.

. . . .

d. The ability of Harlem to hire and retain the necessary doctors and other health professionals would be seriously threatened, because compliance with the regulations would mean asking them to breach professional ethics (which require that full and correct information be given to patients).

e. Harlem has one of the few licensed abortion facilities that provides services to uninsured patients regardless of ability to pay. Pregnant patients who are not informed that abortion is an available option could be at increased

medical risk through delay in finding a facility that provides low-cost or Medicaid-reimbursable abortions.

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ROBERT L. COHEN, M.D.

Vice President, Medical Operations of the New York City Health and Hospitals Corporation
March 3, 1988

. . . .

3. Appropriate medical care requires that a physician present sufficient information for the patient to make an informed, intelligent decision about her course of action and the care she desires. Logically, a pregnant patient needs this information *before* she chooses the provider of that care from the clinic's referral list. This is especially true because the patient's decision about pregnancy is one in which time is genuinely of the essence. The physician's failure to provide vital information, on the assumption that such information may be available to the patient later, is medically irresponsible. The health risks to both mother and fetus increase dramatically with every week of delay.

. . . .

PAUL DRISGULA

Director of Planned Parenthood of Schenectady and Affiliated Counties ("PPSAC")
December 14, 1987

. . . .

18. . . . PPSAC serves a clientele comprised mainly of low-income people who have no other family planning providers or other medical providers to which to turn.

. . . .

22. We will be barred from providing our descriptive and comprehensive fact sheets and referral sheets. Without this information, many of our patients will travel needlessly long distances to obtain services or will contact providers who do not accept Medicaid. As a result, many of our patients may delay or encounter delays in obtaining abortions. Given that health risks increase if a patient receives an abortion after her first trimester, these delays may needlessly result in the health risks to our patients.

. . . .

24. Tragically, in 1986, 15 of our patients became pregnant as a result of rape. The regulations would prohibit us from advising these women of the availability of abortions. . . .

. . . .

27. Separating the abortion services from the Title X funded services as required under the regulations would be prohibitively costly. Acquiring a facility and renovating it to make it acceptable for our needs and compliant with State and local codes would be an extremely expensive proposition. In 1979, we renovated an unused part of our existing building for surgical use. That renovation alone cost $82,000. Even assuming we could use some of our equipment in a new site, we would need to acquire a building which would probably cost between $75,000 and $100,000 for the building and additional costs for ample parking space. It would be unfeasible for PPSAC to shoulder these costs, together with the costs for inventory, equipment, furniture and duplication of staff with our full range of benefits.

. . . .

KATE D. POTTEIGER

Director of Planned Parenthood of Tompkins County (Ithaca) ("PPTC")
December 15, 1987

. . . .

16. PPTC provides services to a population unserved or underserved by other medical providers. . . .

17. Absent comprehensive counseling and discussion regarding all the options available, including abortion, many of our patients will be unable to make an informed choice as to how to manage their pregnancy. Some will not know that abortion is a legal and safe alternative to unwanted or unintended childbearing. Many will not know that increased health risks are associated with abortions obtained after the first trimester. As a result, many of our patients could encounter needless health risks as a result of delaying in obtaining their abortions.

18. The regulations prohibit us from advising women with risky pregnancies of the harm continuing their pregnancies may pose to themselves or the child. The regulations would require us to counsel the woman pregnant as a result of a rape the same as we would counsel a healthy pregnant woman. Similarly, we would be required to counsel the pregnant 14 year old the same as a woman with an intended pregnancy—promoting childbirth and providing information regarding prenatal care until the time of the referral appointment.

. . . .

IRVING RUST, M.D.

Medical Director of the Bronx Center of Planned Parenthood of New York City, Inc. ("PPNYC")
February 5, 1988

. . . .

11. Lack of access to licensed medical facilities has been shown not to deter most patients from seeking an abortion. My inability to refer patients to licensed abortion providers would, accordingly, result in an increase in the number of self-abortions and abortions performed under hazardous medical conditions by persons lacking appropriate training rather than an increase in the number of patients carrying to term.

. . . .

15. The need for the dissemination of abortion information in the South Bronx community is illustrated by one of my patients who tried to abort herself by taking Humphrey's II, an over-the-counter drug which has been reputed to cause early abortion by inducing bleeding. While the drug itself is not dangerous, it will induce bleeding and may cause a partial abortion in a pregnant patient, which can seriously endanger her reproductive health. After treating the patient, I asked her why she had endangered her health when she could have obtained a safe and legal abortion. She responded that she didn't know that she could obtain an abortion, or where information about abortions was available. This incident points out the continuing need to disseminate information about the availability of abortion to the Bronx Center's community.

. . . .

17. There are distinct and additional harms to the lives and health of my patients for whom an abortion is medically indicated.

a. . . . One in 43 babies tested for AIDS in the Bronx are found to carry the AIDS virus. This is the highest figure of AIDS births in New York State. A pregnant patient

with AIDS must be told of the risks to her health and to the health of her child. She should also be told about the abortion option. Some of my patients have sickle cell disease; these women have a 25% chance of going into sickle cell crisis and dying as a result of pregnancy. . . . If a diabetic patient whose blood sugar fluctuates greatly is diagnosed as pregnant, I must inform that patient of the possibility that she may go into diabetic coma or insulin coma, as a result of the additional stress the fetus places on her system. I am also obliged to tell that patient that the fetus may die at any point in the pregnancy. Because such conditions do not clearly constitute "emergencies" under the proposed regulations, I could not provide such essential counseling but instead would be required to give the patients information on prenatal care, thus steering these women toward the serious health risk of carrying to term.

. . . .

MICHAELE P. WHITE

Administrator of Health Resources of The DOOR
December 15, 1987

. . . .

4. . . . Many of these young patients have no other place to which they can turn for information and support regarding their family planning and other health care needs. . . .

. . . .

6. We have observed over the years that many young people lack the motivation and/or ability required to be effective health consumers. They tend to require extensive follow-up to ensure compliance with even the simplest prescribed treatment regimes. In the case of complex treatments for which we lack the appropriate facilities, we must refer young people to other

providers, generally hospitals. Even when a referral is made to a particular clinic at a specified hospital (e.g., for a sonogram at X Hospital), many young people encounter obstacles to treatment at such institutions and seek our assistance. Any inhibition of our ability to assist young people in this situation could have negative consequences for the health of the young person.

. . . .

LORRAINE TIEZZI

Director of Family Planning Clinics at
The Presbyterian Hospital in the City of New York
February 4, 1988

. . . .

8. . . .

a. There is no other facility in the Washington Heights area which provides these kinds of family planning services and counseling, and the patients the Hospital serves are unlikely to go elsewhere in New York City to obtain family planning services. Thus, the curtailment of options counseling, which is compelled by the new regulations, would irreparably harm the patients the Hospital serves because they would get inadequate and incomplete counseling to make reasoned and informed judgments about whether to continue or terminate their pregnancies. . . . Patients for whom abortion is medically necessary could suffer irreparable physic[al] or mental harm, or in extreme cases, death, if they were not informed of the abortion option. . . .

. . . .

e. Presbyterian Hospital may have to redesign or relocate its family planning clinics, because of the requirement that personnel, equipment, and physical location of abortion services be physically separated from the Title X-funded family planning services. Such separation would not likely be financially or practically feasible for the Hospital.

f. When a counselor is prohibited from answering questions by pregnant and non-pregnant women about abortion, the relationship of trust and confidence that has been built up may be irreparably damaged . . . .

. . . .

ROBERTA MERRENS

Executive Director of Northern Adirondack
Planned Parenthood ("NAPP")
December 22, 1987

. . . .

5. 76% of our patients receive subsidized services at our clinic—services which are either free of charge or on a sliding scale basis. No other provider of family planning services in this area provides these services at no cost or on a sliding scale basis. The nearest providers of subsidized family planning services who would serve this population are one and a half hours away by ferry in Vermont or one and a half to two and a half hours away by car on roads covered by snow 6-8 months of the year. For many of our patients, a visit to NAPP is their first entry into the health care system; indeed, for some, it is their only source of regular health care.

. . . .

15. Without the benefit of discussion, many of our patients—particularly our teens and adolescents—will be unaware of the choices available to them. I cannot overemphasize that many women we serve do not know that abortion is a safe and legal option to unwanted childbearing.

. . . .

PAMELA ROE

December 23, 1987

1. I am a United States citizen and I reside in the Bronx. I am an 18 year old senior at John F. Kennedy high school in the Bronx.

2. I first heard about the Bronx Center several weeks ago from my boyfriend, after I told him that I might be pregnant. He knew about the Bronx Center because two of his sisters had used it.

3. I told my boyfriend that I wanted an abortion. I want to go to college and work in a bank one day. If I had a baby now it would be very tough for me. I wouldn't want to burden my mother or family with a baby. I would want my baby to be my responsibility, but I know that I couldn't handle being a mother right now. I would hate to have a baby and end up abusing it because I couldn't handle the pressure of being a mother. When my boyfriend told me about the Bronx Center, I was sure that I wanted an abortion.

. . . .

5. I have no private doctor or other source of health care. I thank God for the fact that I could get good service here at the Bronx Center.

. . . .

7. I know of no [o]ther places in the neighborhood like the Bronx Center.

8. Today I am here for my follow-up visit after abortion. They gave m[e] contraceptives. I wasn't using any form of birth control before I became pregnant.

9. I don't know what I would've done if the Bronx Center were not here. . . .

. . . .

LISA ROE

December 23, 1987

1. I am a United States citizen and I live in the Bronx. Lisa Roe is not my real name. It is a pseudonym I am using to protect my privacy.

2. I am a 17 year old senior at Morris High School in the Bronx.

3. I have been using the Bronx Center since March 1987. I first came here because I was pregnant and I wanted to have an abortion. I had an abortion at the Bronx Center in March. Now I use the family planning clinic. I did not use birth control before I became pregnant. Since my abortion I have used birth control pills provided by the Bronx Center.

4. I am on Medicaid. I have no private doctor or other source of health care.

5. If I didn't have the abortion in March, I might not have been able to finish high school and go on to college. Now I'm planning on starting at LaGuardia Community College in September.

. . . .

7. I would be disappointed if the Bronx Center had to close or couldn't do the good things it can do now, because I'd have no where else to go. I don't know of any other place for birth control or for abortions. I don't know what I would do if the Bronx Center wasn't here.

. . . .

Transcript of Oral Argument at 52 (Feb. 19, 1988) (statement of Robert J. Cynkar, U.S. Department of Justice), *New York v. Bowen*, 690 F. Supp. 1261 (S.D.N.Y. 1988) (Nos. 88-0701, 0702)

. . . .

Your Honor, I think before I get into the law, . . . I would like to address the question of why the change, because I think the "why" is a bit relevant to the law here. And I'm not suggesting that all the medical ethics and whether this is sound policy is relevant to this court. But it is certainly true that one of the prime reasons for these regs is a stricter enforcement of the separation of abortion as family planning from Title X programs. That is a matter of policy. It is a matter of politics.

. . . .

ADDITIONAL MATERIALS

Letter from Representative Christopher H. Smith, *et al.*, to Donald T. Regan (Aug. 1, 1986)

The Honorable Donald T. Regan
Chief of Staff
White House
Washington, DC 20500

Dear Don:

On January 23, we met with you to discuss right-to-life concerns. One of the requests we made was for a change in Health and Human Services regulations, such that organizations which counsel women to give birth rather than to have abortions could qualify for grants under the Title X family planning program.

Under present HHS regulations, no organization that refuses to counsel or refer for abortion can qualify for a grant. This is clearly a violation of the intent of the law.

Don, over the last few years, thousands of pro-life counseling centers have been established around the country to provide

women an alternative to the centers that push abortion. As of today, none of these alternative centers can qualify for a grant, while those which counsel abortion can. Clearly, a change in HHS regulations is in order. We respectfully submit that such a change is overdue, six years into the Reagan Administration.

Inasmuch as no action appears to have been taken at HHS following our January 23 meeting at the White House, once again, we urge the Administration to require HHS to change the Title X regulations.

With warmest regards, we are

Sincerely yours,

/s/ Chris
Rep. Christopher H. Smith

/s/ Gordon
Sen. Gordon J. Humphrey

/s/ Henry
Rep. Henry J. Hyde

/s/ Jack
Rep. Jack F. Kemp

/s/ Vin
Rep. Vin Weber

***Excerpt from* Letter from Otis R. Bowen, M.D., to Representative Vin Weber (Aug. 19, 1986)**

The Honorable Vin Weber
House of Representatives
Washington, D.C. 20515

Dear Mr. Weber:

Mr. Donald Regan asked that I respond to your letter of August 1, recommending a change in the policy which required Title X Family Planning grantees to counsel and refer for abortion under certain circumstances. The change you suggest can be effected by amending the Title X program guidelines: a change in regulations is not necessary.

Much of the work on this guideline change has already been done in the Public Health Service, and I have directed that com-

pleting this effort be given the highest priority. I am confident that the guideline revision can receive the necessary reviews and clearances and be in effect in 30 days.

. . . .

Sincerely,

/s/ OTIS R. BOWEN, M.D.
Otis R. Bowen, M.D.
Secretary